

**TAB**  
**A**



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\* \* \*

**ATTENTION: THIS SUBMISSION AND ITS ATTACHMENTS  
CONTAIN SEALED AND GRAND JURY MATERIAL**

\* \* \*

June 4, 2016

By email: [mark.masling@usdoj.gov](mailto:mark.masling@usdoj.gov)

Mr. Mark Masling, Esq.  
Assistant Counsel  
Office of Professional Responsibility  
Department of Justice  
950 Pennsylvania Ave., N.W., Suite 3266  
Washington, D.C. 20530

Re: *United States v. Donald L. Blankenship*, No. 5:14-cr-00244 (S.D. W. Va.)

Dear Mr. Masling:

Defendant Donald L. Blankenship (“Defendant”), the former Chief Executive Officer and Chairman of the Board of Directors of Massey Energy Company (“Massey”), was convicted in December 2015 of conspiring to violate mandatory federal mine safety and health standards at his company’s Upper Big Branch mine (“UBB”), where 29 coal miners were killed in an explosion in April 2010. On April 6, 2016, he was sentenced to a year in prison, the maximum term authorized by law for his offense. Defendant is now serving that sentence at the federal prison camp in Taft, California; on May 12, 2016, a three-judge panel of the United States Court of Appeals for the Fourth Circuit unanimously denied his motion for release pending appeal. In litigating that motion, the parties provided what amounted to full briefing of Defendant’s appeal: more than 40 pages of briefing on each side, substantially exceeding the normal page limits for briefs on the merits. After receiving this detailed briefing, the Fourth Circuit did not find that Defendant presented even a substantial question that, if decided in his favor, was likely to result in reversal. In other words, given Fourth Circuit case law, the panel did not find that Defendant raised even a close question or a question that reasonably might be decided either way.

Defendant is part of the rare class of defendants who can, in effect, write a blank check for an army of high-powered defense attorneys not only to defend him on the merits but also to mount an endless series of attacks against the individual prosecutors handling his case. Regrettably, those attacks are now part of the standard playbook for such defendants, and this case is no exception. Defendant’s motion and trial practice relied heavily on allegations of

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prosecutorial misconduct, each of which the court examined and found to be baseless.<sup>1</sup> Having tried and failed to discredit the prosecution in court, Defendant now rehashes a litany of his losing claims in a complaint directed to Assistant Attorney General Caldwell.<sup>2</sup> At the request of Office of Professional Responsibility (“OPR”) Counsel Robin A. Ashton, the instant letter responds to that complaint.

At the outset, it bears noting that none of the claims in Defendant’s complaint are the subject of a current dispute in his criminal case or his appeal. Most were raised and rejected in the district court. The minority that were not raised before or during trial have not been raised in any post-trial motion. And none of the claims in Defendant’s complaint are mentioned in his statement of issues he will raise on appeal.<sup>3</sup> In other words, every contention in Defendant’s complaint is one that he either has lost in court and abandoned or deemed insufficiently meritorious to pursue in court at all. Referring to Defendant’s claims using the numbering in OPR Counsel Ashton’s letter, claims number two, three, five, seven, eight, nine, and ten were rejected by the district court. Claims one, four, and six were never asserted in court and lack any merit.

#### **Background on the United States’ discovery production**

Since most of Defendant’s assertions allege discovery violations, some discussion is in order regarding the discovery that the United States produced. Defendant was indicted on November 13, 2014, and arraigned on November 20, 2014. On December 4, 2014, two weeks after arraignment, the United States turned over its entire electronic document database to the defense. The database was searchable and contained full metadata to permit filtering and sorting during Defendant’s document review. The United States made 15 additional discovery productions before trial, supplementing the original production with newly obtained materials. Well before trial, the United States identified for Defendant several thousand pages of documents that the United States specifically identified as *Brady* material that Defendant should review with care. And although the district court specifically ruled that the United States was not required to produce its own memoranda of witness interviews, the United States nonetheless produced such memoranda for all the witnesses that it would call at trial, along with dozens of other witnesses that it did not call.

Defendant was the fifth defendant prosecuted in the wake of the UBB mine explosion, and the United States produced documents and transcripts from all four previous

<sup>1</sup> See, e.g., Dist. Ct. Doc. 217 (Apr. 8, 2015 Order rejecting Defendant’s allegation of vindictive and selective prosecution) (attached as Exhibit 1); [REDACTED]

[REDACTED] Dist Ct. Doc. 222 (Apr. 8, 2015 Order rejecting Defendant’s allegation of *Brady* violations) (attached as Exhibit 3); Dist. Ct. Doc. 294 (Aug. 10, 2015 Order rejecting Defendant’s allegation that United States improperly failed to produce documents from MSHA) (attached as Exhibit 10); Dist. Ct. Doc. 549 (Dec. 9, 2015 Order denying Defendant’s final allegations of discovery misconduct) (attached as Exhibit 5).

<sup>2</sup> The complaint to AAG Caldwell was sent and signed by Defendant’s counsel, but it begins by stating that counsel represents Defendant and that “[w]e write to request” a review of purported prosecutorial misconduct. It appears that defense counsel has filed the complaint on Defendant’s behalf. Accordingly, this response refers to the complaint as Defendant’s.

<sup>3</sup> *United States v. Blankenship*, No. 16-4193 (4th Cir. 2016) (Doc. 15) (docketing statement filed Apr. 22, 2016) (attached as Exhibit 6).

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prosecutions. These included documents from the prosecutions of **Witness #29**, a former low-ranking UBB supervisor who pleaded guilty to making false statements; **Witness #30**, UBB's former security chief, whom a jury convicted of making false statements and obstructing justice; **Witness #31**, UBB's former mine superintendent, who pleaded guilty to conspiring to impede the Mine Safety and Health Administration's ("MSHA") safety enforcement efforts at UBB; and **Witness #25**, a former Massey division president, who pleaded guilty to conspiring to impede MSHA and conspiring to violate mandatory mine safety and health standards. **Witness #3** and **Witness #26** were called as witnesses by the United States in Defendant's trial.

The United States produced voluminous discovery from the records of MSHA, which is the federal agency that enforces mine safety laws. These included all safety citations issued at UBB during the period covered by the indictment, all of the handwritten notes that supported those citations, and the other administrative documents that the United States possessed relating to safety inspections at the mine. Contrary to Defendant's contention, which is addressed in more detail below, the United States also produced hundreds of emails to and from MSHA inspectors who inspected UBB during the indictment period. And the United States produced the transcripts of hundreds of witness interviews that MSHA conducted during its investigation of the explosion.<sup>4</sup>

In sum, the United States made what was very nearly an open-file production, one that went well beyond its obligations under the law or Department of Justice policy. Defendant suggests that the United States made it difficult for him to obtain necessary discovery, but the truth of the matter is that almost all of the more than 250 exhibits that Defendant introduced at trial were drawn from the United States' discovery production.

### Discovery motion practice and trial practice

From the beginning of this case, Defendant sought—without success—to advance claims of discovery misconduct by the United States. Many of the accusations that the district court rejected are now repeated in Defendant's complaint to AAG Caldwell, so a brief history is provided here. On February 6, 2015, Defendant made his first allegation that the United States had failed to produce *Brady* material.<sup>5</sup> On April 8, 2015, the court rejected that accusation, finding that Defendant's motion for production of further *Brady* material was premature at best and noting no evidence of *Brady* violations by the United States.<sup>6</sup> On May

<sup>4</sup> OPR Counsel Ashton's letter requests information on prosecution team members and their roles in discovery. The lead prosecutor was the undersigned, who also was primarily responsible for discovery, including the discovery matters discussed herein. The undersigned's professional experience and qualifications are set forth in a footnote at the end of this submission. **Paralegal #1** also worked extensively on discovery productions, as did **Paralegal #2**. Other attorneys on the trial team were **AUSA #1**, **AUSA #2**, and former United States Attorney R. Booth Goodwin II, Mr. Goodwin and **AUSA #1** and **AUSA #2** played only minor roles in discovery matters. Case agents were **FBI SA #1** and **DOL SA #1**. Neither agent played a role in discovery matters.

<sup>5</sup> Dist. Ct. Doc. 112 (Memorandum in Support of Motion to Enforce the Government's *Brady* Obligations, attached as Exhibit 7).

<sup>6</sup> Dist Ct. Doc. 222 (attached as Exhibit 3).

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27, 2015, Defendant filed a motion seeking to compel the United States to produce additional documents from MSHA that he suggested were improperly being withheld.<sup>7</sup> And on July 8, 2015, before the court ruled on the MSHA-related motion, Defendant again leveled broader accusations that the United States had failed to produce *Brady* material, and sought an evidentiary hearing on his claims.<sup>8</sup>

On August 10, 2015, the court terminated as moot the May 27 motion for additional MSHA documents, finding, “It clearly appears that the United States has searched items within its and/or MSHA’s ‘possession, custody, or control,’ including documents relating to the investigation of UBB through [the] lens of both *Brady* and Rule 16. The Defendant has not pointed to any specific portion of Rule 16 with which the United States has not complied.”<sup>9</sup> Also on August 10, 2015, the court rejected Defendant’s broader, July 8, 2015 claim of *Brady* violations, finding no reason to conduct the evidentiary hearing that Defendant sought.<sup>10</sup>

On September 17, 2015, Defendant filed another motion claiming that MSHA materials were being withheld improperly.<sup>11</sup> The district court did not rule on that claim before trial began on October 7, 2015, but ultimately rejected it after additional mid-trial briefing, described below.

The trial in this matter lasted several weeks. During that time, Defendant made—and the court rejected—further allegations of discovery misconduct. Three of those mid-trial claims are significant here. The first concerned **Witness #4** [REDACTED] at the time of the explosion. On Friday, October 30, 2015, the United States concluded its redirect examination of **Witness #4**. At the end of redirect, Defendant asserted the United States had committed “a gross *Brady* violation” by not disclosing, before **Witness #4** testimony, pro-defense statements that the defense was able to elicit from him on cross-examination.<sup>12</sup> Defendant sought to question **Witness #4** further regarding this purported *Brady* violation.<sup>13</sup> The court considered Defendant’s position over the ensuing weekend and made a ruling on Monday, November 2, 2015. The court did not find any *Brady* violation. It did offer to let Defendant question **Witness #4** further, if he so desired, to develop his claim of misconduct.<sup>14</sup> But when offered the opportunity to do what he had demanded a few days earlier—examine **Witness #4** regarding the purported *Brady* violation—Defendant abandoned that demand and said nothing more about this alleged misconduct the rest of the trial.

Defendant’s second mid-trial misconduct claim involved a witness named **Witness #13**. **Witness #13** [REDACTED] The United States called **Witness #13** as a witness in Blankenship’s trial. After **Witness #13** direct examination, the defense gave the United States and the court a copy of a declaration by **Witness #13** that was submitted in an unrelated civil matter in 2011

<sup>7</sup> Dist. Ct. Doc. 261 (Motion to Compel Production of MSHA Material, attached as Exhibit 8).

<sup>8</sup> Dist. Ct. Doc. 283 (Motion to Compel Compliance with *Brady* Order and for Other Appropriate Relief, attached as Exhibit 9).

<sup>9</sup> Dist. Ct. Doc. 294 (attached as Exhibit 10).

<sup>10</sup> Dist. Ct. Doc. 295 (attached as Exhibit 11).

<sup>11</sup> Dist. Ct. Doc. 377 (attached as Exhibit 12).

<sup>12</sup> Trial Tr. 3702:8-14 (attached as Exhibit 13).

<sup>13</sup> *Id.*

<sup>14</sup> Trial Tr. 3724:5-23 (attached as Exhibit 14).

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(the “<sup>Witness #13</sup> declaration”).<sup>15</sup> In that declaration, <sup>Witness #13</sup> claimed that, after the UBB explosion, a <sup>Witness #32</sup> told <sup>Witness #1</sup> saw another MSHA employee remove documents from that office. <sup>Witness #32</sup> and the name of the MSHA employee who purportedly removed documents from the district office was <sup>Witness #33</sup>. The <sup>Witness #13</sup> declaration did not say what the purportedly removed documents were.

Defendant claimed that the United States had committed misconduct by not producing the <sup>Witness #13</sup> declaration to him before trial.<sup>16</sup> He moved for a mistrial or, in the alternative, a recess for the court to investigate the alleged misconduct.<sup>17</sup> The United States explained, in response, that it had no knowledge of the <sup>Witness #13</sup> declaration until Defendant produced it at trial.<sup>18</sup> The court denied the motion for a recess, choosing instead to review the allegations at a later time.<sup>19</sup>

The next day, November 5, 2015, the defense disclosed two more declarations from the same 2011 civil matter in which the <sup>Witness #13</sup> declaration was filed.<sup>20</sup> One was from <sup>Witness #32</sup>, according to <sup>Witness #13</sup> told <sup>Witness #13</sup> that documents had been removed from the MSHA district office. <sup>Witness #32</sup> declaration said that <sup>Witness #1</sup> never told <sup>Witness #1</sup> that <sup>Witness #1</sup> saw <sup>Witness #33</sup> removing documents from the MSHA office and that <sup>Witness #1</sup> did not, in fact, see <sup>Witness #33</sup> remove documents.<sup>21</sup> The second newly disclosed declaration was from <sup>Witness #33</sup>, the MSHA employee who purportedly had removed the documents. <sup>Witness #33</sup> also rejected <sup>Witness #13</sup> allegations.<sup>22</sup>

That same day, November 5, 2015, while <sup>Witness #13</sup> was still on the witness stand, the court itself questioned <sup>Witness #1</sup> about <sup>Witness #13</sup> declaration. In particular, the court—presumably seeking to confirm the United States’ statement that it was unaware before trial of any allegation of document removal—asked whether <sup>Witness #13</sup> had discussed the matter with any attorneys other than those who prepared his declaration.<sup>23</sup> <sup>Witness #13</sup> testified that <sup>Witness #1</sup> had not.<sup>24</sup> A day later, on November 6, 2015, as the trial continued, Defendant filed a written motion reasserting his claim that the United States committed misconduct by not disclosing the <sup>Witness #13</sup> declaration.<sup>25</sup> The district court denied that motion, expressly finding no evidence to support the claim of misconduct by the United States.<sup>26</sup>

The third mid-trial allegation of misconduct was part of that same November 6 defense motion, which was Defendant’s final bid in the district court to suggest misconduct by

<sup>15</sup> Def. Trial Ex. 568 (attached as Exhibit 15). Note that this exhibit was marked and reviewed by the court but not admitted into evidence at trial.

<sup>16</sup> Trial Tr. 4117:3-4119:9 (attached as Exhibit 16).

<sup>17</sup> *Id.* 4119:1-9 (included in Exhibit 16).

<sup>18</sup> *Id.* 4119:11-4120:3 (included in Exhibit 16).

<sup>19</sup> *Id.* 4120:4-19 (included in Exhibit 16).

<sup>20</sup> Trial Tr. 4398:3-6 (attached as Exhibit 17).

<sup>21</sup> <sup>Witness #32</sup> declaration was filed in the district court as <sup>Witness #32</sup> to District Court Document 496, a filing by the United States, and is attached as Exhibit 17A to this response.

<sup>22</sup> <sup>Witness #33</sup> declaration was filed in the district court as <sup>Witness #33</sup> to District Court Document 496 and is attached as Exhibit 17B to this response.

<sup>23</sup> Trial Tr. 4404:13-21 (included in Exhibit 17).

<sup>24</sup> *Id.*

<sup>25</sup> Dist. Ct. Doc. 481 (attached as Exhibit 4).

<sup>26</sup> Dist. Ct. Doc. 549, at 6 (attached as Exhibit 5).

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the United States. Defendant incorporated, as part of that motion, his September 17, 2015 motion claiming MSHA materials were being improperly withheld, on which the court had not yet ruled as of November 6.<sup>27</sup> As already noted, the court then denied the November 6 motion, finding no evidence of misconduct.

### Responses to specific defense claims

OPR Counsel Ashton's letter requests responses to ten contentions raised in Defendant's complaint to AAG Caldwell. The remainder of this response addresses those contentions in turn.

#### (1) Allegation regarding **Witness #3**

Defendant first complains that the United States failed to disclose purportedly exculpatory information provided by **Witness #3**. Specifically, Defendant complains that **Witness #3** said he did not attend certain budget review meetings, including meetings in the indictment period, and that the United States failed to disclose this information.

**Witness #3** who was involved in the company's annual budgeting process. Although **Witness #3** did provide the United States information about Defendant's role in that process, the information was inculpatory rather than exculpatory. Specifically, **Witness #3** confirmed for the United States that throughout the relevant time period, Defendant possessed final approval authority over Massey's annual budget, and that this authority had nothing to do with his presence or absence in any specific budget meeting, but rather was exercised based on written copies of draft budgets. **Witness #3** stated that Defendant received these written drafts at various stages of the annual budgeting process, including a near-final version of the budget, which Defendant personally adjusted before it was finalized. After receiving these drafts, Blankenship communicated directly with **Witness #3** every day, regarding his wishes on budgeting matters. Although **Witness #3** did corroborate what the United States already knew and had already disclosed to the defense (more on this disclosure below)—that Defendant did not attend all meetings in the budgeting process—the import of **Witness #3** information was to confirm that Defendant was personally involved in the budgeting process and had final approval authority. **Witness #3** did not indicate that it was material to that authority whether Defendant was present at particular meetings in the budgeting process.

The United States chose not to call **Witness #3** as a witness in part because **Witness #3** testimony would have been cumulative of other testimony and evidence, and in part because **Witness #3** would have presented poorly on the witness stand. When interviewed, **Witness #3** spoke in a barely audible voice and appeared extremely anxious. Because the United States did not plan to call **Witness #3** as a witness, and because the information **Witness #3** provided was inculpatory and cumulative of other inculpatory information already disclosed, the United States did not produce information about the interview with **Witness #3** to the defense. That decision was made by the undersigned.

Defendant also alleges that the United States elicited false or misleading testimony from **Witness #4** on the subject of Defendant's role in the budgeting process. Defendant claims that the United States elicited testimony that suggested Defendant was present in budgeting meetings when it knew that he had not been. But the United States did

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<sup>27</sup> Ex. 4.

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not elicit testimony that Defendant was present in any budget meeting. The pertinent transcript section is attached as Exhibit 18 to this response. It shows that the United States elicited testimony from **Witness #4** not that Defendant attended budget meetings, but that he was the highest-ranking Massey official involved in the budgeting process generally.

That very fact—that Defendant was the highest-ranking official involved in the budgeting process—was explicitly conceded by defense counsel in his own cross-examination of **Witness #4**. In cross-examining **Witness #4** on the budgeting process, defense counsel led **Witness #4** through the steps of that process, then stated, “the final plan that we, that we end up with here is the one that’s ultimately approved by Mr. Blankenship presumably.”<sup>28</sup> **Witness #4** agreed with that statement. It is difficult to see how Defendant can complain that the United States elicited false or misleading testimony about his preeminent role in the budgeting process when defense counsel elicited substantively the same testimony on cross-examination. That testimony, moreover—that Defendant was the highest-ranking official involved in the budgeting process—is supported by every pertinent piece of evidence in the record.

Finally, as noted above, the United States did disclose to the defense evidence that Defendant often was absent from meetings in the budgeting process. That information was provided to the United States by **Witness #4**, and was disclosed to the defense in the United States’ initial, December 4, 2014 discovery production. Notably, armed with that information, the defense cross-examination of **Witness #4** did not include a single question suggesting that Defendant’s presence or absence at budgeting meetings had any bearing on his ultimate authority over the budget. Defendant’s silence on this point at trial, and his acknowledgement in the **Witness #4** cross-examination that Defendant was the final approver of Massey’s budgets, underscores the inculpatory explanation **Witness #3** gave the United States: Defendant possessed final approval power in the budgeting process, and his presence or absence at a given budgeting meeting had nothing to do with that.

## (2) Allegation regarding **Witness #4**

Defendant also claims that the United States failed to disclose a statement by **Witness #4** that **Witness #4** and Defendant had no agreement to violate mine safety laws. **Witness #4** however, did not make such a statement to the United States before trial. On the contrary, the information that **Witness #4** provided the United States before trial, as well as **Witness #4** testimony in the grand jury, **Witness #4**

**Witness #4** also reaffirmed this earlier testimony in **Witness #4** direct and redirect examinations at trial. It is true that on cross-examination, the defense was able to elicit testimony from **Witness #4** that was inconsistent with **Witness #4** testimony in the grand jury and on direct and redirect examination. But as anyone who tries criminal cases likely has learned the hard way, it is not uncommon for a witness sympathetic to the defense to give unanticipated pro-defense testimony on cross-examination. Just because a witness “goes south” on cross-examination does not mean that the United States committed a discovery violation. In this case, as explained above, the court reviewed Defendant’s misconduct allegation mid-trial and found no violation. And when the court granted Defendant’s request to examine **Witness #4** further to bolster his position, Defendant reversed course and abandoned his complaint altogether.

<sup>28</sup> Trial Tr. 3180:15-17 (attached as Exhibit 19).

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Witness #4

29 Witness #4

30 Witness #4

31 Nothing that Witness #4 told the United States before trial testimony contradicted that grand jury testimony. And, as already noted, Witness #4 reaffirmed each of those items of testimony on the witness stand at trial.<sup>32</sup>

Defendant's complaint also raises Witness #4 trial testimony that Defendant ordered Witness #4 to reduce safety violations. That testimony pertained to a program that Massey introduced in 2009, several months before the UBB explosion, called the Hazard Elimination Program, in which the company's mines were assigned targets for the number of illegal safety violations they were allowed to commit. Each mine's nominal target was to commit half as many illegal safety violations as it had during a specified earlier period. At trial, Defendant contended that this directive, to commit only half as many illegal safety violations as before, represented a defense to the charges against Witness #4.

Setting aside the question of that defense's validity, the United States conspicuously disclosed before trial that Witness #4 had received the instruction to reduce violations by half. The United States produced to Defendant—and explicitly identified as *Brady* material—numerous emails and memoranda that Witness #4, among others, received regarding the instruction to commit only half as many illegal safety violations. The reduce-by-half directive was, for example, highlighted in an exhibit the United States used in the grand jury, which was disclosed to Defendant.<sup>33</sup> To the extent Defendant contends the United States did not disclose these directive to reduce violations, his claim lacks any basis.

Like many of the purported grievances Defendant raises in his complaint, this one was litigated and resolved in the district court. As explained above, after Witness #4 testimony, the defense asked the court to find the same *Brady* violations that he alleges here.<sup>34</sup> The court found no such violation. It did offer to let Defendant examine Witness #4 further to seek evidence of such a violation if Defendant wished to do so.<sup>35</sup> Defendant chose not to pursue further testimony from Witness #4 on the issue, and elected not to pursue its *Brady* claim any further in the district court.

<sup>29</sup> Witness #4 G.J. Tr. 106:13-16 (Nov. 12, 2014) (attached as Exhibit 20).

<sup>30</sup> *Id.* 106:17-24.

<sup>31</sup> *Id.* 108:3-5.

<sup>32</sup> Trial Tr. 3321:8-3326:22 (attached as Exhibit 21).

<sup>33</sup> Exhibit 50 from the November 12 and 13, 2014, grand jury session, which shows the targets to commit only half as many illegal safety violations as in a previous period, and which was produced to Defendant many months before trial, is attached as Exhibit 22 to this response.

<sup>34</sup> Trial Tr. 3724:5-23 (attached as Ex. 14).

<sup>35</sup> *Id.*

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**(3) Allegation regarding purported statement that Massey “applaud[ed]”  
Massey initiative**

Defendant also alleges that the United States failed to produce a letter from an MSHA official to a Massey official “applaud[ing]” a purported Massey safety initiative (the “applaud” letter). The United States did not possess that letter until it received a copy attached to a pretrial defense motion, despite substantial efforts to locate it. The defense filed a copy of the “applaud” letter with the court on September 17, 2015, as an exhibit to a motion to compel production of documents by MSHA.<sup>36</sup> After the defense made the letter available in this manner, MSHA attorneys, at the request of the United States, sought to locate a copy of the letter in MSHA’s files, but determined that the letter was not in the files that were in MSHA’s possession. The United States does not know how Defendant obtained the “applaud” letter, but it is notable that he chose not to introduce it at trial and chose not to call its author as a witness, even though the author, **Witness #9**, was on the defense witness list.

The United States’ purported failure to produce the “applaud” letter has already been litigated in the district court. Defendant complained about the letter and the United States’ purported failure to produce it in his September 17, 2015 motion to compel noted above. But Defendant provided no evidence that the “applaud” letter had ever been in the United States’ possession. After Defendant incorporated the September 2015 motion into his final, November 2015 motion alleging discovery violations, the Court denied that motion, finding no evidence that the United States had failed to meet its discovery obligations.<sup>37</sup>

**(4) Allegation regarding statement in June 22, 2015 *Brady* letter**

Defendant next alleges that the United States made the following statement in a June 22, 2015 letter to defense counsel: “[T]he United States does not know of any evidence” required to be disclosed under *Brady*.” In fact, the United States did not make that statement. Rather, the United States said the following: “[T]he United States does not know of any evidence that *truly* tends to exculpate Defendant.” (Emphasis added).<sup>38</sup>

This statement was made to clarify that, even though the United States was producing documents that might be offered to support various anticipated defense theories, it did not accept the legitimacy of any of those theories. In other words, the United States did not regard evidence that might be used support the defense’s theories as truly exculpatory. That caveat was important because the United States intended to (and ultimately did) submit motions *in limine* challenging the validity of the theories it expected the defense would offer at trial, and did not want to have its production of documents construed as a concession that any defense theory was legitimate. Such qualifying statements are commonplace in discovery productions.

As Defendant is well aware, the United States produced voluminous evidence pursuant to its obligations under *Brady* and Rule 16. In fact, the very statement of which Defendant complains was part of the preface to a letter that designated hundreds of pages of *Brady* material that Defendant should be alert to in preparing his defense. The qualifying language that the United States offered in its June 22, 2015 *Brady* letter was not false, nor did it suggest any disregard of the United States’ discovery obligations.

<sup>36</sup> Dist. Ct. Doc. 377 (attached as Exhibit 12).

<sup>37</sup> Dist. Ct. Doc. 549 (attached as Exhibit 5).

<sup>38</sup> The letter in question is attached as Exhibit B to Defendant’s complaint to AAG Caldwell.

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**(5) Allegation regarding Witness #1, Witness #6, Witness #8 and other witnesses**

Defendant next contends that the United States failed to provide exculpatory information from interviews with various witnesses. OPR Counsel Ashton's letter asks about witnesses whom the United States purportedly interviewed, including Witness #1, Witness #6, and Witness #8. With respect to Witness #1, the United States never interviewed Witness #1. The United States sought to interview Witness #1, but Witness #1's counsel refused to permit such an interview unless the United States entered into an immunity agreement with Witness #1. The United States declined to do so and thus was unable to speak with Witness #1.

With respect to Witness #6, the United States interviewed Witness #6 and turned over to Defendant two memoranda reflecting those interviews.

With respect to Witness #8, the United States interviewed Witness #8 and turned over a summary of information favorable to the defense: specifically, that Witness #8 believed Defendant was interested in safety and made changes to Massey equipment that improved safety at the company's mines. Defendant argued in the district court that such summaries were inadequate and the defense was entitled to whatever work product the United States generated in connection with the interview—notes, memoranda, or the like. The court denied the motion, specifically finding that production of interview memoranda and notes was not required.<sup>39</sup>

The United States also disclosed information from other witnesses that it believed could be favorable to the defense. For example, the United States notified the defense of favorable information provided in the form of proffers from counsel for Witness #10, Witness #11, and Witness #18. The United States informed the defense that Witness #7, could not confirm that Defendant personally saw a particularly damning February 2010 internal memorandum about safety-law violations at Massey, which was a key piece of evidence. The United States informed the defense that Witness #13, who was the United States' key witness, disagreed with an important aspect of MSHA's approach to ventilation at UBB; that fact became a cornerstone of the defense case. And the United States turned over—and flagged as *Brady* material—numerous memoranda of witness interviews that described various Massey safety programs that also became central to the defense case.<sup>40</sup> These are only examples of pertinent disclosures made by the United States.

**(6) Allegation regarding individuals with immunity agreements**

Defendant further complains about the information that the United States provided regarding individuals with immunity agreements. Defendant claims the United States provided him no information that it received from any such witness before that witness entered into his or her immunity agreement.<sup>41</sup>

<sup>39</sup> Dist. Ct. Doc. 279, at 12 (June 12, 2015 Order) (attached as Exhibit 24).

<sup>40</sup> For an example, see the memorandum of interview of Witness #34, who spoke favorably of Massey's so-called "S-1" or "Safety First" program, attached as Exhibit 23. This memorandum was disclosed to Defendant on December 4, 2014. Defendant chose not to call Witness #34 as a witness.

<sup>41</sup> OPR Counsel Ashton's letter also requests a response concerning a September 21, 2015 letter from defense counsel. Defendant's complaint is correct that the United States did not respond to that letter. From shortly after the indictment in this case, it became clear that part of Defendant's strategy was to use his superior resources and

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That claim simply is incorrect. Of the 21 witnesses with whom the United States entered into immunity agreements, all 21 were interviewed by the United States before those immunity agreements were reached, and the United States produced to Defendant memoranda documenting all of those pre-immunity interviews. Those memoranda reflect the information that the United States received from the witnesses prior to their immunity agreements.

Notably, most of the 21 witnesses with immunity agreements were not witnesses against Defendant. Rather, they were witnesses against the other Massey defendants prosecuted earlier in the post-explosion investigation, and the United States disclosed their immunity agreements only out of an abundance of caution. For example, seven of the witnesses with immunity agreements were UBB security guards interviewed in the investigation of **Witness #30** who was convicted in 2011 after a jury trial. Others were witnesses who were interviewed solely in connection with the investigations of **Witness #31** and **Witness #25**, both of whom pleaded guilty to mine safety crimes. In fact, of the 27 witnesses the United States called at Defendant's trial, only four had immunity agreements. And pre-immunity interviews with all four of them were disclosed to Defendant in December 2014, nearly a year before trial.

#### **(7) Allegation regarding MSHA inspection materials**

Defendant also asserts that the United States did not properly produce materials relating to MSHA's inspections of the UBB mine. This contention was raised and rejected in the district court. The United States recognized and complied with its obligation to produce inspection-related materials that were favorable to the defense, material to preparing the defense, or otherwise subject to the United States' disclosure duties. Accordingly, the United States obtained from MSHA and produced to Defendant what it understands to be all records from MSHA's inspections of UBB during the indictment period. These included all citations issued at UBB during the indictment period, all notes taken by inspectors during inspections of the mine, logs of when each area of the mine and piece of mechanical equipment in the mine was inspected, results of all testing done as part of mine inspections (including testing to assess the amount of coal dust miners were breathing, the flow of fresh air in the mine, and the application of material designed to prevent the spread of fires and explosions), logs reflecting reviews of written records at the mine, and records of citations that mine officials contested, among other documents. In total, the United States produced thousands of pages of records detailing every inspection visit of UBB during the indictment period. A sample citation and sample set of inspector notes are attached as Exhibits 25 and 26, respectively, to this response.

Despite this extensive production, Defendant complains about the inspection-related records he received. His complaint appears to be this: Shortly before trial, he issued a trial subpoena to MSHA that resulted in the production of thousands of pages of documents that

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larger legal team to make so many motions and demands that the United States could not keep up with them and also prepare for trial. As the case went on, the United States did not respond to every one of the many letters that Defendant sent, particularly letters demanding material that had already been produced. Because the United States had already produced its pre-immunity information from all 21 witnesses with immunity agreements, the undersigned concluded it was unnecessary to correspond further on that subject.

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had not previously been produced. Defendant suggests that because many of these documents were not produced until his subpoena to MSHA, there was some misconduct on the part of the United States.

The reason that the trial subpoena yielded new documents, however, was that it was vastly overbroad. It required the production of thousands of pages of material that had nothing to do with the case (or with safety inspections of UBB) and thus had not been part of previous productions by the United States. For example, the documents responsive to the subpoena included various lists of every mine (coal mine, metal mine, sand and gravel quarry, and mining-related processing facility, among others) in the United States. Printed out, these lists each filled more than 5,000 pages. Because the lists included UBB, they had to be produced in response to Defendant's subpoena, even though they were entirely unrelated to the case. The subpoena swept in many other similarly non-germane documents, resulting in a wildly inflated page count that said nothing about the adequacy of the United States' previous productions.

From these tens of thousands of pages of documents, Defendant was able to identify only a single, brief item that he claimed was favorable to him and previously unproduced. It was a typed summary of a mine inspection conducted on October 14, 2009, which Defendant attached as Exhibit K to his complaint. In listing the results of the inspection, it noted, among other things, that "The mine roof appears solid. The section is very clean and well kept. All ventilation controls are up. Traveled the section belt and the longwall belt. The belts are very well rock dusted and very clean." The summary also identified the inspectors who conducted this October 14, 2009 inspection.

The specific document in question summarized inspections at many mines, not just UBB, and it was not among the documents that MSHA provided to the United States when the United States requested records of UBB inspections. Because the United States did not possess that specific document before Defendant's subpoena to MSHA, it did not produce it to Defendant.

But the United States did obtain, and did produce to Defendant early on, other records of the same October 14, 2009 inspection. These included the original inspection notes made by the inspectors who were at the mine that day. Those notes reflect favorable comments about what was observed during that inspection, similar to the comments from the typed summary that was produced in response to the trial subpoena to MSHA: "The mine roof along the track appears solid."<sup>42</sup> "The section is very clean." "All ventilation controls are in place." "The belt entry is well rock dusted." "The section is well rock dusted." "Had closeout with **Witness #35** spoke to him about a good job on the #6 and #5 North beltlines." The notes also identified the inspectors who made these positive comments. It is difficult for Defendant to claim that the United States' failure to obtain the typed summary through its initial document request to MSHA represents intentional misconduct when the United States did locate and produce the original, handwritten notes that the summary was based on.

As noted above, Defendant raised this claim in the district court, and the court found no merit in it. In his September 2015 motion claiming misconduct relating to MSHA materials, filed shortly before trial, Defendant complained that the production of the typed summary of

<sup>42</sup> The pertinent notes are attached as Exhibit 26.

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the October 14, 2009 inspection showed that other discoverable material was being improperly withheld.<sup>43</sup> Defendant then incorporated the September 2015 motion's allegations into his November 6, 2015 motion to compel the production of such purportedly concealed material.<sup>44</sup> The court denied that motion, expressly finding that there was no evidence the United States had failed to meet its discovery obligations.<sup>45</sup>

#### **(8) Allegation regarding Mine Safety and Health Administration emails**

Defendant also contends that the United States made an inadequate production of emails from MSHA inspectors. In particular, he suggests that the United States produced only two emails from MSHA inspectors who inspected UBB during the indictment period. That premise is incorrect. The United States recognized its duty to search for and produce emails that fell within its discovery obligations. Accordingly, the United States produced hundreds (at least) of emails to and from MSHA officials, including hundreds from MSHA inspectors who inspected UBB during the indictment period. In preparing this response, the undersigned sampled two different sets of MSHA emails produced to Defendant to obtain a general sense of how many were produced. Even this cursory check disclosed at least 300 emails that were sent to or from MSHA inspectors who inspected UBB during the indictment period. Some of these emails were correspondence between inspectors and Massey employees, and were produced to the United States by Massey or Alpha. At least 150 were internal MSHA emails retrieved by MSHA through searches of its employees' email accounts, which were conducted at the United States' request. The emails produced included emails to or from **Witness #36**, **Witness #37**, and **Witness #11**.

Defendant raised his claim of an insufficient email production, like the others in his complaint, in the district court. He appeared to believe that there must be thousands of emails to and from MSHA inspectors discussing the substance of the violations they discovered at UBB. The United States' review, however, disclosed that relatively few such emails exist. The reason for this is straightforward: MSHA has (and had during the indictment period) a policy that discourages inspectors from discussing the substance of safety violations outside the formal records that exist for that purpose. Those formal records are, primarily, the citation form for citing violations and the official, handwritten notes that inspectors make to document the observations underlying citations. Those records were disclosed to Defendant in December 2014. Although Defendant undoubtedly hoped to find a trove of emails in which inspectors discussed their UBB inspections in more casual terms, it simply did not exist.

In the district court, Defendant raised this "not enough emails" claim in his September 2015 motion seeking more MSHA documents, which was incorporated into his final, November 2015 discovery allegations.<sup>46</sup> As noted above, the district court denied that November 2015 motion, finding no evidence of any inadequacy in the United States' discovery.<sup>47</sup>

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<sup>43</sup> Dist. Ct. Doc. 377 (attached as Exhibit 12).

<sup>44</sup> Dist. Ct. Doc. 481 (attached as Exhibit 4).

<sup>45</sup> Dist. Ct. Doc. 549 (attached as Exhibit 5).

<sup>46</sup> See Exhibit 4.

<sup>47</sup> See Exhibit 5.

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**(9) Allegation regarding MSHA inspectors as witnesses**

Defendant next complains that the United States did not call MSHA inspectors as witnesses. He conjectures that this was to conceal a discovery violation. Defense counsel is correct that the United States did not call as witnesses inspectors who inspected UBB before the explosion. But the reason had nothing to do with a discovery violation. Rather, the United States decided not to call MSHA inspectors for garden-variety reasons of trial strategy.

First, the witnesses were unnecessary. The United States decided that the most effective way to prove the existence of rampant safety violations at UBB was through the testimony of coal miners who worked there. The United States believed that the jury would identify more readily with rank-and-file coal miners than with federal inspectors. Accordingly, the United States presented the testimony of around a dozen UBB coal miners, who testified they were required to violate mine safety laws continually, working in often harrowing conditions in order to increase profits and cut costs.

Second, the United States concluded that there were substantial disadvantages to calling MSHA inspectors as witnesses. At the moment, public opinion in West Virginia generally is hostile toward the federal government, and particularly hostile to federal regulation that affects the mining industry. Political candidates and elected officials here regularly contend that the federal government is waging a “war on coal,” and that federal overregulation is to blame for the recent economic decline in the coal industry. The United States anticipated that the defense would seek to capitalize on this sentiment. That expectation proved correct: In the cross-examination of one witness, the defense managed, over the United States’ objection, to invoke no fewer than 48 times the suggestion that President Obama personally was responsible for the investigation that led to the charges against Defendant.<sup>48</sup> In these circumstances, the United States believed that calling federal mine regulators as witnesses would permit the defense to press its theme of excessive federal interference with the local mining industry—and feared that theme would hold powerful appeal for the jury.

The issue of calling MSHA inspectors as witnesses was litigated in the district court. Defendant asserted that the United States could not introduce evidence of safety citations issued at UBB unless it called as witnesses the inspectors who wrote the citations.<sup>49</sup> The court rejected that claim, ruling that citations could be offered as evidence of notice to Defendant and other conspirators, and that the United States was not required to call MSHA inspectors as witnesses if it chose not to do so.<sup>50</sup>

**(10) Allegation regarding MSHA document destruction.**

Defendant’s final claim is another one that the district court reviewed and rejected. Defendant suggests that the United States committed discovery violations in connection with the purported destruction of documents by **Witness #33**, an MSHA employee in MSHA’s district office in southern West Virginia. A full description of Defendant’s contention

<sup>48</sup> Trial Tr. 4808-35 (attached as Exhibit 27).

<sup>49</sup> Dist. Ct. Doc. 399 (Defendant’s objection to admitting MSHA citations without calling inspectors as witnesses) (attached as Exhibit 28).

<sup>50</sup> Voir Dire Tr. 853:11-855:3 (attached as Exhibit 29). The court ruled on several evidentiary disputes on the last full day of voir dire. Those rulings, including the ruling that the United States was not required to call MSHA inspectors as witnesses, therefore are part of the voir dire transcript.

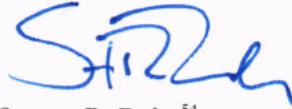
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and the district court's ruling is provided above, in the section on motion and trial practice. To summarize here, the United States was not aware of the [Witness #1] declaration or [Witness #1] allegation about documents being removed until Defendant produced the [Witness #1] declaration at trial. After reviewing the matter, the district court squarely rejected Defendant's claim that the [Witness #1] memorandum provided any evidence of discovery violations by the United States.<sup>51</sup> The person who [Witness #1] claimed mentioned the document removal to [Witness #1] said, in essence, that [Witness #1] had no idea what [Witness #1] was talking about.<sup>52</sup> The district court recognized that there was no basis to pursue the matter further.<sup>53</sup>

### Conclusion

Defendant's complaint largely recycles a set of claims that were raised in the district court and found to lack merit. The contentions that he raises for the first time in his complaint are similarly unsupported. None of his claims is the subject of any current dispute in his criminal case or appeal, Defendant having either abandoned them after losing in the district court or not regarded them as serious enough to raise in court at all. The record demonstrates that the United States more than satisfied its discovery obligations in this case. Defendant's complaint warrants no further action by OPR.

Respectfully submitted,



Steven R. Ruby<sup>54</sup>  
Assistant United States Attorney

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<sup>51</sup> Exhibit 5.

<sup>52</sup> Exhibit 17A.

<sup>53</sup> Exhibit 5.

<sup>54</sup> OPR Counsel Ashton's letter requests information on the writer's professional background and qualification.

**TAB**  
**B**

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September 30, 2016

By email: mark.masling@usdoj.gov

Mr. Mark Masling, Esq.  
Assistant Counsel  
Office of Professional Responsibility  
Department of Justice  
950 Pennsylvania Ave., N.W., Suite 3266  
Washington, D.C. 20530Re: *United States v. Donald L. Blankenship*, No. 5:14-cr-00244 (S.D. W. Va.)

Dear Mr. Masling:

This letter responds to your follow-up questions regarding the letter of complaint submitted by counsel for the defendant (hereinafter "Defendant") in the above-referenced case. This response includes each of your questions in italic type with my response provided afterward.

1. *Taylor alleged that prosecutors failed to disclose to the defense prior to trial certain exculpatory assertions that Witness #4 made during cross-examination. The assertions to which Taylor referred are set forth in his letter to Criminal Division Assistant Attorney General Leslie Caldwell (Caldwell). In your written response, you stated that Witness #4 exculpatory assertions were "unanticipated." However, in trial transcript excerpts attached to Taylor's letter to Caldwell, Witness #4 testified that either or attorney told the government prior to trial that did not believe committed a crime and had not participated in a criminal conspiracy to commit mine safety regulation violations. Is it your contention that Witness #4 testimony was false, and that neither Witness #4 nor attorneys provided those assertions to the government prior to trial? To further our understanding of this issue, please provide us with all documents reflecting what Witness #4 or attorneys told the government (prosecutors, agents, or others) outside of the grand jury prior to trial, including handwritten notes of interviews, and memoranda summarizing the substance of those interviews.*

The memoranda of Witness #4 statements to the prosecution team are enclosed as Exhibits 1 through 6 to this letter. As they reflect, Witness #4 did not specifically tell the prosecution team that did not believe committed any crime and did not participate in a criminal conspiracy.

Witness #4 did, however, make two statements to the prosecution team that expressed view that any criminal culpability on part was limited. It is possible that had those statements in mind when testified that had denied committing a crime or engaging in a criminal conspiracy. The first of these two statements was that there will

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always, in any mine, be violations of safety laws that regulators can cite if they choose. This statement was disclosed to the defense in the memorandum of **Witness #4** October 22, 2014 proffer session, enclosed as Exhibit 1. See Ex. 1 at MOI-001401 (“There are always going to be violations that MSHA could cite.”). Second, **Witness #4** said that while **Witness #4** was in charge of UBB, **Witness #4** believed that a tacit agreement to violate a mine safety law was not a crime. **Witness #4** believed that in order to commit a mine safety crime, one had to expressly order a safety violation to be committed. This statement was disclosed to the defense in the same memorandum cited above. See Ex. 1 at MOI-001403. The memorandum of the interview in which **Witness #4** made these statements was produced to the defense on December 4, 2014.

Prior to the prosecution team’s interviews with **Witness #4** United States Attorney (USA) Goodwin and I discussed with **Witness #4** counsel the possibility that **Witness #4** could be charged. In this discussion, **Witness #4** counsel made the two points discussed above: **Witness #4** believed that there will always be violations of safety laws in any coal mine. And **Witness #4** did not believe that a tacit understanding to allow routine safety violations to continue—as distinct from an express order to commit safety violations—was criminal. As explained above, both these statements by **Witness #4** were disclosed to the defense in a memorandum of interview. I interpreted these statements to mean that **Witness #4** believed **Witness #4** had little or no criminal culpability. But I do not recall **Witness #4** counsel making the specific statement that **Witness #4** did not believe **Witness #4** had committed any crimes or participated in a criminal conspiracy. Rather, my recollection is that **Witness #4** counsel instead spoke in the more particularized terms that I have described and that were disclosed to the defense.

**Witness #4** counsel made these statements in a telephone conversation in which I participated while I was out of the office **Witness #4**. I do not have notes of the conversation.

By the time **Witness #4** testified at trial, I assumed—perhaps mistakenly—that **Witness #4** counsel had informed **Witness #4** that a tacit understanding can form the basis of a criminal conspiracy and that willful mine safety violations are crimes even in contexts where violations occur regularly. **Witness #4** had testified in the grand jury that preventable violations of mine safety laws were committed routinely at UBB and that there was an understanding—of which Defendant was a part—that such violations would be tolerated as a cost of doing business. I thus did not anticipate **Witness #4** blanket statements on cross-examination that **Witness #4** did not believe **Witness #4** had committed a crime or participated in a conspiracy.

2. Taylor alleged that the government wrongfully failed to disclose prior to trial statements made by **Witness #3** that Blankenship did not attend preliminary or final business plan review meetings during the indictment period. In your written response to this allegation you told us, among other things, that information reflecting the assertion that Blankenship did not attend preliminary or final business plan meetings was disclosed to the defense in the government’s December 4, 2014 pretrial disclosures, in documents relating to **Witness #4**. Please provide us with copies of the documents to which you referred, including Bates stamps or other markings showing that those documents were produced to the defense prior to trial. We may show any such documents to Taylor and ask him to explain his allegation that Blankenship’s defense was prejudiced by the government’s decision not to produce **Witness #3** statements in light of the production of those

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*documents.*

The prosecution team produced several documents to the defense disclosing that Defendant did not attend all—or even many—Massey business plan meetings. To summarize (more detail is provided below), the prosecution team disclosed that [REDACTED], said Defendant never participated in the business-plan meetings that [REDACTED] attended. The prosecution team also disclosed that [REDACTED], said Defendant “was not always part of” meetings involving mine staffing and participated only “sometimes” in meetings conducted in the business planning process. And the prosecution team disclosed a calendar that conclusively showed Defendant did not attend some of the business planning meetings during the period that the calendar covered and strongly indicated that he did not attend any of them. Still other documents produced by the prosecution team disclosed that Defendant participated in the business-plan process primarily remotely, not by attending meetings in person.

[REDACTED] was, during much of the indictment period, [REDACTED] remained beyond the end of the indictment period. In an interview with a case agent on August 23, 2013, [REDACTED] stated that [REDACTED] “could not remember an occasion where [REDACTED] and BLANKENSHIP attended a five year budget meeting where he [REDACTED] was also in attendance. However, [REDACTED] was aware that [REDACTED] had attended some five year budget meetings.” Ex. 7 at 2 ([REDACTED] memorandum of interview). The “five year budget meetings” were the same business-plan reviews to which [REDACTED] referred; the company’s annual business plans each covered a five-year forward-looking period. *See, e.g.*, Ex. 9 (Aug. 17, 2006 email from [REDACTED] to Defendant regarding 2007-2011 business plan). The memorandum of the August 23, 2013 [REDACTED] interview was produced to the defense well before trial.

[REDACTED]. The United States also produced the memorandum of an October 22, 2014 proffer interview with [REDACTED], in which [REDACTED] stated that Defendant “was not always part of” meetings regarding mine staffing and only “sometimes” attended meetings conducted during the business planning process. *See* Ex. 1 at 4 (last two paragraphs on page). The United States produced this memorandum to the defense well before trial.

*August 2009 calendar.* The United States further produced a calendar that showed that Defendant was not scheduled to attend business-plan meetings in the period that the calendar covered and was out of town when several of the meetings occurred. The calendar was set out in a document entitled Don L. Blankenship Schedule Reminder, August 19-31, 2009. *See* Ex. 8. According to this calendar, on August 26 and 27, 2009, four business-plan meetings were scheduled for Massey’s regional office in Julian, West Virginia. *See id.* at 4-5. The calendar showed that on those dates, Defendant was on a trip to Baltimore, Maryland, and Washington, D.C. *Id.* On August 28, 2009, two more business-plan meetings were scheduled for Massey’s Julian office. *Id.* at 5. But on that date, Defendant was scheduled to attend a meeting at his office in Belfry, Kentucky. (In an unusual arrangement, Blankenship’s

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worked out of a small building in rural Kentucky belonging to a minor Massey subsidiary, while the rest of Massey's executives worked either in the company's Richmond, Virginia headquarters or its Julian, West Virginia regional headquarters.)

More generally, the calendar showed that business planning meetings were not events that Defendant was scheduled to attend. On the calendar, each day's listing showed two types of events. Events that Defendant was scheduled to attend were listed in large type immediately after the date. Below these events was a bullet-point list of other notes that were provided for informational purposes rather than to indicate that Defendant was scheduled to attend or participate. For example, in the first page of the calendar, the large-type section shows that Defendant had a "PR Effort Conference Call" scheduled from 4:00 to 4:30 p.m. on August 19. Ex. 8 at 1. At the bottom of the entry for August 19 appear two informational bullet points, in smaller type, noting the occurrence of a race at a racetrack in Tennessee (Defendant's son regularly competed in minor automobile racing events) and that [REDACTED] Witness #30. *Id.* The next entry, for August 20, shows, in large type, three appointments in which Defendant was scheduled to participate, followed by small-type bullet points noting, among other things, that two executives were on vacation and that two business-plan meetings were to be conducted. *Id.* at 1-2. This pattern continues throughout the calendar, with business-plan meetings noted in the informational bullet points used to notify Defendant of executives' vacations and similar matters—not among the events that he was scheduled to actually attend.

The United States requested from Massey all Defendant's calendars but did not receive similar calendars from other time periods.

*Emails reflecting Defendant's remote participation in the business-plan process.* The prosecution team also disclosed that much of Defendant's participation in the business-plan process was accomplished by reviewing and responding to documents that he received by email rather than attending business-plan meetings. Enclosed as Exhibits 9 through 34 are email messages that reflect this fact.<sup>1</sup> These messages span a period of time from August 2006 through August 2010. For example, Exhibit 9 is an August 17, 2006 email message from [REDACTED] Witness #1, [REDACTED] Witness #27, [REDACTED] Witness #27, [REDACTED] Witness #3, and [REDACTED] Witness #27. Attached to the message was an Excel spreadsheet of production data for the company's 2007-2011 business plan (as noted above, the business plan for each year covered that year plus four years into the future). The message said that [REDACTED] Witness #1 had scheduled a call that day to discuss the planning document with Defendant by telephone.

Exhibit 18 is a June 10, 2008 email to all Massey's operating group presidents—including [REDACTED] Witness #4—that included UBB—to which was attached the 2009 production plan "that has been reviewed by the Chairman"—*i.e.*, Defendant. The email specified that various portions of the business plan could be changed only with Defendant's personal approval. These included "feet per shift," which referred to the

<sup>1</sup> Some of these exhibits do not have Bates numbers printed on the exhibit documents themselves. These exhibits were produced to the defense as part of an electronic document database that indicated the exhibits' Bates numbers in database fields rather than on the faces of the documents. For purposes of reference, the beginning Bates number of each of these exhibits is reflected in the name of the pertinent exhibit file included with this letter. This same system is used to provide the Bates number of any other enclosed exhibit that does not have Bates numbers printed on the document itself.

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number of linear feet of coal that each working shift was expected to produce. The feet-per-shift requirement was a key constraint on the amount of time that each mine could devote to safety-related tasks. The email contained no reference to any business-plan meeting.

Exhibit 31 is a September 15, 2009 email from [Witness #2] to Defendant, which said that “the current roll-up on the group plans” for 2010 was attached. The email went on to inform Defendant that there was “[s]till a lot of work to do & reviews to go thru.” [Witness #3] statement informing Defendant that there were still a lot of reviews to go through, and [Witness #4] email providing Defendant with a summary of the plan as it stood at that point in the review process, further establish that Defendant did not personally attend all the business-plan reviews.

These three examples are illustrative, but the entire set of exhibits from Exhibit 9 to 34 bear review. They show that much of Defendant’s involvement in the business-plan process took place outside of meetings, and that the prosecution team disclosed this fact. Equally important, they show that business-plan meetings with officials of individual mines were not the principal vehicle by which Defendant exercised his authority over Massey’s business plans, whether he attended the meetings or not.

The voluminous business-plan spreadsheets that were attached to these emails are not included with the exhibits to this letter but can be provided if needed.

*3. Taylor alleged that the government produced to the defense only two e-mails to or from the eight Mine Safety and Health Administration (MSHA) inspectors who inspected the Upper Big Branch (UBB) mine during the indictment period. In your written response, you stated that you had searched the government’s document production to the defense and identified at least 300 e-mails to or from MSHA inspectors during the indictment period. You stated that at least 150 of those e-mails were internal MSHA e-mails, including internal e-mails to or from [Witness #36], [Witness #37] and [Witness #11]. Please provide us with a sample of those e-mails, including internal e-mails, with Bates stamps or other markings showing that those e-mails were produced to the defense prior to trial. We may show any such e-mails to Taylor and ask him to explain his allegation that only two such e-mails were produced in light of the existence of those additional e-mails.*

Exhibits 39 through 59 are examples of email messages that were sent to or from MSHA inspectors and were produced to the defense prior to trial. Exhibits 42 through 59 were produced to the defense as “.msg” (Microsoft email message) format files without Bates numbers, in a September 8, 2015 production. They are enclosed herewith with the same filenames under which they were produced to the defense, with the exception that an exhibit number has been added to the beginning of each filename.

Notable documents among these exhibits include Exhibits 41A, 50, 51, 53, 57, and 59, which are emails to and from [Witness #36]; Exhibit 59, which is an email to [Witness #37] and Exhibits 39, 49, and 56, which are emails to and from [Witness #11].

In connection with this issue, I note that the defense errs in claiming that only eight inspectors inspected UBB during the indictment period. As the United States disclosed to the defense in a document beginning at Bates number VP-MSHA-108222, which is enclosed as Exhibit 60 hereto, at least 24 inspectors issued citations at UBB during the indictment period.

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4. In your written response, you stated that the government produced to the defense memoranda of witness interviews for all witnesses testifying at trial, as well as for “dozens” of witnesses who did not testify. You also stated that you made the decision not to produce to the defense the memorandum or memoranda summarizing the interview(s) of **Witness #3**. Please explain why you decided to produce memoranda for some non-testifying witnesses but not others, and state how many non-testifying witness memoranda were produced to the defense and how many were not produced. In addition, please provide us with copies of all documents reflecting what **Witness #3** or **Witness #4** attorney told the government (prosecutors, agents, or others) outside of the grand jury prior to trial, including handwritten notes of interviews, and memoranda summarizing the substance of those interviews.

The prosecution team’s initial discovery production, made on December 4, 2014, included all memoranda that the prosecution team had prepared to that point in the investigation, without regard to whether they were required to be produced. This approach resulted largely from necessity: The United States was allotted two weeks after Defendant’s November 20, 2014 arraignment in which to produce all its discovery, which comprised several million pages of documents. [REDACTED]

[REDACTED] I was the person most familiar with the discovery materials in the prosecution team’s possession and had primary responsibility for coordinating their production. Under those circumstances, in order to meet our deadline, the prosecution team took what was effectively an open-file approach to interview memoranda that had been prepared prior to indictment.

After Defendant was indicted, the prosecution team took a narrower approach to producing information from witness interviews. During this post-indictment period, most of the prosecution team’s meetings were trial-preparation meetings with witnesses who had already been interviewed at least once prior to indictment and who were being prepared to testify at trial. During this period, the prosecution team did not produce every interview memorandum that was generated; rather, information generally was produced if it was new and its production was required.

After the interview with **Witness #3** as I noted in my previous letter to you, I did not regard as exculpatory **Witness #3** statement that Defendant did not attend all business-review meetings. The significance of **Witness #3** statement, as I understood it, was that Defendant had ultimate authority over Massey’s business plans without regard to attendance at meetings. The indictment and superseding indictment contained no allegation that Defendant attended business-plan meetings; rather, they alleged that Defendant had approval authority over Massey’s budgets and production requirements. *See* Superseding Indictment ¶ 50 (ECF 169). And at trial, at least, the defense seemed to agree that the question of whether Defendant attended or did not attend specific meetings was immaterial. As explained in my previous letter, the defense did not question **Witness #4** about Defendant’s attendance at meetings. This was true even though the United States had disclosed **Witness #4** and **Witness #5** statements about Defendant’s non-attendance at business-plan meetings. It goes without saying, moreover, that Defendant himself also knew whether he had missed many business-plan meetings, yet his counsel was silent on that issue in **Witness #4** cross-examination—

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presumably because the meeting issue was immaterial to the defense.

With respect to your question about numbers of interview memoranda produced, the prosecution team produced several hundred memoranda of pre-indictment interviews of witnesses who ultimately did not testify. After the explosion, the criminal-investigation team interviewed as many as possible of the hundreds of miners who worked at UBB; many of those interviews were unproductive, but the memoranda reflecting them nonetheless were produced to the defense. Similarly, many witnesses were interviewed in aspects of the broader Massey investigation that did not directly pertain to Defendant, including the prosecutions of the four other defendants convicted as a result of the investigation. The memoranda of those interviews also were produced.

There were approximate 15 memoranda of interviews of non-testifying witnesses that were not produced. These memoranda pertained to interviews conducted in the post-indictment, trial-preparation phase of the case, during which time the prosecution team conducted only a fraction of the number of interviews that it conducted during the four-and-a-half-year period between the explosion and the indictment.

The memorandum of the interview with **Witness #3** is enclosed as Exhibit 61.

*5. Please inform us as to whether the prosecution team (or others) searched, or arranged for others to search, MSHA documents for possibly relevant (both inculpatory and exculpatory) documents in connection with any criminal investigation or prosecution related to the Upper Big Branch mine explosion. If so, please provide us with all documents relating to what documents were searched, and how those searches were conducted (manually, electronically, using search terms, etc). Please provide us with copies of all instructions to MSHA as to how to search for relevant documents. To be clear, we are only looking to learn about the search methodology (if any), and are not seeking the documents identified in any such searches.*

Relatively early in the prosecution team's investigation, MSHA produced to the prosecution team all its files from pre-explosion inspections of the UBB mine. MSHA also produced to the prosecution team all the memoranda of interviews that it conducted as part of MSHA's own investigation of the UBB explosion. MSHA further produced to the prosecution team its complete file of ventilation plans for UBB, along with all correspondence concerning ventilation plans. These materials contained both information that was inculpatory and information that the defense might have regarded as favorable to it. The United States produced all these materials to the defense.

The prosecution team did not expect to find a large number of substantive UBB-related communications outside these official files because MSHA discouraged its personnel from discussing mine-related matters in communications other than those that were included in official files. Nonetheless, the prosecution team requested that attorneys with the United States Department of Labor (DOL) conduct an electronic search of email and other documents to identify any potentially exculpatory information not in the official mine file. (DOL is MSHA's parent agency.) The documents that the prosecution team requested be searched included all electronic documents collected in MSHA's internal review of its own performance in inspecting and regulating UBB prior to the explosion.

The DOL review team agreed to use search terms to search several different sets of documents. Documents that matched the search terms were reviewed by DOL attorneys to

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identify possible exculpatory information, and documents that were identified as possibly exculpatory were then referred to members of the prosecution team for final review. I conferred with the DOL review team to establish search terms and sets of documents to be searched electronically. USA Goodwin provided further guidance to the DOL review team on which documents should be flagged as potentially exculpatory.

The instructions to the DOL review team are enclosed as Exhibit 62.

After this initial search, Defendant sought a trial subpoena that would require production of a broader set of documents. When Defendant sought this subpoena, the prosecution team requested that MSHA voluntarily identify all documents responsive to the proposed subpoena, regardless of whether they otherwise were required to be produced in discovery. MSHA did so, and the prosecution team voluntarily produced those documents on September 8, 2015. The proposed subpoena upon which MSHA was asked to base this search is attached as Exhibit 62A.

6. Taylor alleged that the government failed to disclose prior to trial allegations that MSHA had destroyed relevant documents. Those allegations were contained in a declaration signed by **Witness #13**. In your written response you asserted that the government had not known about the **Witness #13** declaration prior to the defense's use of that document during the trial. To further our understanding of this issue, please provide us with all documents reflecting what **Witness #13** or **Witness #13** attorneys told the government (prosecutors, agents, or others) outside of the grand jury prior to trial, including handwritten notes of interviews, and memoranda summarizing the substance of those interviews. With regard to the allegations in the **Witness #13** declaration, please inform us as to whether the prosecution team conducted any investigation of the allegations contained in that declaration, and if so, what investigative measures were undertaken and what was learned about those allegations.

The memoranda reflecting the United States' interviews with **Witness #13** are enclosed as Exhibits 63 through 68. These documents reflect that, as explained in my earlier letter to you, **Witness #13** made no mention to the United States of any destruction of MSHA documents.

After the defense introduced the declaration that **Witness #13** filed in a 2011 Massey civil suit against MSHA, the United States reviewed that declaration, as well as other contradictory declarations filed by other witnesses. The United States also was present when the trial court questioned **Witness #13** under oath regarding **Witness #13** declaration. **Witness #13** declaration claimed that an **Witness #27** had told **Witness #13** that **Witness #13** saw another MSHA supervisor remove documents in trash bags from a local MSHA office. **Witness #27**, in a separate declaration, denied that **Witness #13** had seen this or told **Witness #13** that **Witness #13** had seen it. See June 6, 2016 Letter from Ruby to Masling, Ex. 17A. The MSHA supervisor denied that it had occurred. See *id.* Ex. 17B. The court considered these declarations and **Witness #32** testimony and concluded that no further inquiry was required. The prosecution team, after considering the same evidence, agreed, and found no substantial basis to investigate further.

7. Taylor alleged that the government failed to disclose prior to trial an MSHA letter in which a district manager "applaud[ed]" Massey's mine safety initiative. Please clarify your written response to this allegation; we are not clear as to whether the government searched for that letter prior to receiving a copy that was attached to a defense motion. If the government searched for that letter prior to receiving the defense

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*motion, please explain how the government learned about it. Also, please clarify your statement that the defense provided no evidence to show that the “applaud letter” was ever in the government’s possession. If that letter was written by an MSHA official, wasn’t the letter at that time in the government’s possession? If so, is there any explanation for why the substantial search efforts you described failed to locate it?*

The prosecution team first learned of the “applaud” letter when it received the copy of that letter that was attached to a defense motion before trial. Prior to reviewing that motion, the United States did not search specifically for the “applaud” letter, although, as explained above, it did cause MSHA and DOL to conduct searches that were intended to locate documents such as the “applaud” letter if they existed. It was these general searches for exculpatory documents that my prior letter referred to when it mentioned our “substantial efforts” at identifying discoverable documents.

After the United States received the copy of the “applaud” letter attached to the defense motion, it asked MSHA to search all files that might reasonably contain a copy of the letter. The purpose of this request was to determine whether the “applaud” letter was in MSHA’s files but was missed in prior document collections. This specific search for the “applaud” letter was unable to locate a copy of the letter anywhere in MSHA’s files. According to the DOL attorney who supervised the search, employees at the local MSHA office believed, based on experience with the office’s practices for maintaining correspondence, that it was possible that no copy of the letter was retained or filed when it was sent.

8. *Taylor alleged that the government failed to disclose prior to trial exculpatory information provided by Witness #6. In your written response, you asserted that the government provided the defense with two memoranda reflecting the government’s interviews of Witness #6. To further our understanding of this issue, please provide us with all documents reflecting what Witness #6 or any attorneys told the government (prosecutors, agents, or others) outside of the grand jury prior to trial, including handwritten notes of interviews, and the two memoranda summarizing the substance of those interviews. In addition, in your written response you discuss disclosing to the defense “favorable” information from Witness #10, Witness #18, and Witness #7. Please provide us with the documents the government provided to the defense containing the favorable information you described.*

The memoranda reflecting the United States’ interviews with Witness #6 are enclosed as Exhibits 35 and 36. Enclosed as Exhibits 37 and 38 are letters in which the United States disclosed information from Witness #10, Witness #18, and Witness #7 that the defense might have viewed as favorable to its position.

9. *Taylor alleged that the government failed to disclose information provided to the government by persons who entered into immunity agreements with the government. In your written response, you asserted that the government provided the defense with memoranda documenting pre-immunity interviews for all such witnesses. Please clarify whether the government provided the defense with “information provided to the government by these individuals or their counsel during discussions that led to the execution of the agreements.” Please also clarify whether those witnesses or their counsel “professed innocence,” and if so, whether those statements were disclosed to the defense.*

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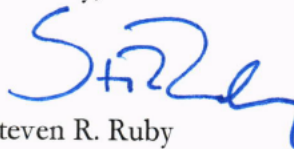
The prosecution team's discussion with counsel for **Witness #4** is explained above, in the response to your first question. The statements made by **Witness #4**, **Witness #4** counsel that minimized **Witness #4**'s criminal culpability were disclosed as described in that response.

With respect to other witnesses who entered into use immunity agreements, all substantive information that those witnesses or their counsel provided prior to entering into the agreement was provided in the witnesses' proffer interviews, and the memoranda of all those proffer interviews were disclosed to the defense.

Your question also asks about "professions of innocence." There were four witnesses who testified at trial under use-immunity agreements: **Witness #4**, **Witness #39**, **Witness #40**, **Witness #40** and **Witness #24**. Of these four, **Witness #4** was the only one with whom (or with whose counsel) the United States discussed the possibility that the witness might be charged criminally. In the cases of **Witness #39**, **Witness #40** and **Witness #24** because there was never any discussion of possible charges as to which they might have professed their innocence, the question of whether there was a profession of innocence does not squarely apply. In an effort to answer the question, however, I note that **Witness #3** and **Witness #40** both were involved in providing advance notice of mine inspections. Both truthfully admitted their involvement in this practice, but both explained that they had been directed by others to engage in it. I do not know whether their statements about being directed by others constitute professions of innocence within the meaning of your question, but, in any event, those statements were disclosed in memoranda of interviews that were produced to the defense. **Witness #24** meanwhile, was involved in the preparation of a filing with the Securities and Exchange Commission ("SEC") that was the subject of Counts Two and Three of the superseding indictment. **Witness #24** stated that **Witness #24** worked out of Massey's Richmond headquarters, did not receive information about safety violations at the company's mines—including UBB—and therefore did not know whether the statements made in the SEC filing were true or false. Again, the United States never discussed the possibility of charging **Witness #24** and I do not know whether **Witness #24**'s statement about **Witness #24**'s lack of knowledge of Massey's safety practices at UBB constitutes a profession of innocence within the meaning of your question, but, in any event, it was disclosed to the defense in the memorandum of **Witness #24** interview.

Please do not hesitate to contact me if you have further questions.

Sincerely,



Steven R. Ruby  
Assistant United States Attorney

**TAB**  
**C**

**From:** Steven Ruby  
**To:** [Masling, Mark \(OPR\)](#)  
**Subject:** Memoranda  
**Date:** Thursday, January 19, 2017 8:22:09 AM  
**Attachments:** [Witness #15 - 2014-03-11.pdf](#)  
[Witness #15 - 2015-03-31.pdf](#)  
[Witness #21 - 2015-09-29.pdf](#)  
[Witness #41 - 2015-09-13.pdf](#)  
[Witness #42 - 2015-09-17.pdf](#)  
[Witness #42 - 2015-07-21.pdf](#)  
[Witness #43 - 2015-07-31.pdf](#)  
[Witness #7 - 2015-06-30.pdf](#)  
[Witness #44 - 2015-06-24.pdf](#)  
[Witness #45 - 2015-03-26.pdf](#)  
[Witness #17 - 2014-03-11.pdf](#)  
[Witness #16 - 2011-11-10.pdf](#)  
[Witness #1 - 2011-11-10.pdf](#)

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Mark,

I am sending, in this and two follow-up emails, the bulk of the memos you requested. There are a smaller number -- about a dozen -- still outstanding that I will request from the U.S. Attorney's Office as soon as personnel there are available this morning. I will ask that they be provided today, so you will have them by the time you are finished with this set.

In submitting these, there are some important points to make. First, most of the information in the memos is either inculpatory or neutral with respect to the charges against the defendant.

Second, to the extent there was information that could be regarded as materially favorable, most or all of that information was available to the defense in some other form. In that regard, it is important to emphasize the larger context of the discovery, in which hundreds of other memos and interview transcripts--including memos and transcripts of interviews with many of these same witnesses--were disclosed, not to mention hundreds of thousands of documents, many of which disclosed the same information discussed in these memos. One of the benefits of making broad disclosures is that even if discoverable information from one source is inadvertently omitted from a production, the same information will be made available from another source. If there were inadvertent omissions here, you will find that this redundancy effect generally applied.

Third, with regard to the memos that were prepared by **FBI SA #1**, you will see that **FBI SA #1** trial testimony did not focus on information provided by witnesses in whose interviews **FBI SA** participated. On the contrary, testimony of that nature from **FBI SA #1** generally would have been hearsay. Accordingly, you will find that **FBI SA** trial testimony focused on **FBI SA** review of specific sets of voluminous documents, all of which were produced to the defense, and that **FBI SA** testimony involved little or no discussion of the witness interviews reflected in his memos.

Fourth, some of the memos in this set relate to interviews from phases of the investigation that ultimately did not result in charges against the defendant or pertain to trial. And some of the memos in this set were produced to the defense -- I believe

you have referred to these in one of your outstanding requests.

Fifth, in compiling these memoranda, I discovered that one of them was from a 2011 interview with **Witness #1**, which was conducted by **Witness #46** rather than an attorney from the U.S. Attorney's Office. In a previous submission, I stated that our team had not interviewed **Witness #1**. That statement was based on the fact that when the USAO team sought an interview with **Witness #1** in approximately 2012 or 2013 regarding a broad range of practices at Massey, **Witness #1** refused to be interviewed. **Witness #46** interview, which was much narrower than the one that **Witness #1** refused, **Witness #46**

The memo was among a group of memos from pre-indictment interviews that were provided late by the agents who prepared them and inadvertently omitted from our production. I did not recall that **Witness #46** had interviewed **Witness #1** in early investigation of contract fraud. But given the nature of the interview, I do not believe its omission was material.

Sixth, as I explained in our recent telephone conversation, the decision to make disclosures from post-indictment interviews by means of letters rather than production of full interview memoranda was a decision made by the prosecution team, and ultimately the then-U.S. Attorney, who closely supervised the investigation, and personally oversaw and participated in the trial. The entire prosecution team, including the then-U.S. Attorney, reviewed and approved the letter-form disclosures that were made regarding post-indictment interviews.

Seventh, and finally, I believe that the trial transcript will establish that the defense not only possessed, in some form, all discoverable information contained in these memos, but also used it at trial. Even if you reach a conclusion that some aspects of these memoranda should have been disclosed, there was no material prejudice to the defense from the omission to disclose them.

As we discussed, I am preparing further written responses to your outstanding questions. To the extent you find that these memoranda (or the other unproduced memoranda that you already have) contain information that requires further explanation, I request the opportunity to explain why that information was not viewed as exculpatory, was otherwise made available to the defense, or was adduced at trial.

Steve

**TAB**  
**D**

Steven Ruby

September 28, 2017

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U. S. DEPARTMENT OF JUSTICE  
OFFICE OF PROFESSIONAL RESPONSIBILITY

)  
OFFICE OF PROFESSIONAL )  
RESPONSIBILITY INVESTIGATION )  
)  
INTERVIEW UNDER OATH OF: )  
FORMER ASSISTANT UNITED )  
STATES ATTORNEY STEVEN RUBY )

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\* \* \*

INTERVIEW UNDER OATH OF  
FORMER ASSISTANT UNITED STATES ATTORNEY STEVEN RUBY

Thursday, September 28, 2017

9:14 a.m.

\* \* \*

Robert C. Byrd U.S. Courthouse  
300 Virginia Street, Suite 4000  
Charleston, West Virginia 25301

\* \* \*

██████████, Professional Court Reporter

Steven Ruby

September 28, 2017

2

APPEARANCES OF COUNSEL:

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RESPONSIBILITY:

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Steven Ruby

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I N D E X

WITNESS

PAGE

Steven Ruby, Esquire

Examination By Mr. Masling ..... 4

E X H I B I T S

NOTE: All exhibits mentioned or referred to within the transcript were retained by attorney.

Steven Ruby

September 28, 2017

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\* \* \*

STEVEN RUBY, ESQUIRE

being first duly sworn, was examined and deposed as follows:

\* \* \*

E X A M I N A T I O N

BY MR. MASLING:

Q. All right.

It is September 28th of 2017. I am Mark Masling, assistant counsel, Department of Justice Office of Professional Responsibility. With me is OPR Assistant Counsel John Sciortino. We are in the United States Attorney's Office for the Southern District of West Virginia, interviewing a subject of the United States versus Blankenship OPR investigation, former Assistant United States Attorney Steven Ruby.

Based on what we've talked about briefly before we went on the record, I understand that you would like to make some preliminary statements, which is totally fine and the floor is yours.

A. Thank you.

The first and general point that I want to make as we get started is that nobody in this office or on the trial team intentionally withheld anything that

Steven Ruby

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1 they believed should have been produced to the defense  
2 in the Blankenship case, nor would we have done that.  
3 With that said, I'll talk a little bit preliminary about  
4 the main question that I believe you want to discuss,  
5 which is how did we handle the post-indictment  
6 memorandum of interview of witnesses.

7 Q. Yes, although there were some pre-indictment,  
8 but yes.

9 A. I understand. By way of background and to  
10 explain or to give background for some of the  
11 conversations that I had with other members of the trial  
12 team, I was concerned about discovery from the beginning  
13 of the case. Before we charged the case, I had repeated  
14 conversations with the U.S. Attorney about the  
15 challenges that we would face with discovery.

16 There were hundreds, maybe thousands of MOIs;  
17 there were millions of documents in the case that came  
18 from many different sources that had been collected over  
19 years. And with that much discovery, I understood that  
20 there was a not insignificant risk that we would make a  
21 mistake somewhere. And my point to the U.S. Attorney  
22 was about specifically the approach that I anticipated  
23 the defense would take with a case that size that the  
24 defense would, based on some experience that I had in

Steven Ruby

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1 similar cases, file a very large number of motions,  
2 attempt to put us in a situation where our team, which  
3 was almost certain to be small, relative to the team  
4 that we expected the defense would have, would be  
5 pressed for time, would be under pressure and would  
6 eventually make some sort of mistake, and that that  
7 mistake was most likely to come because of the volume of  
8 materials in the production of discovery.

9 And it had been my experience that in cases  
10 like the Blankenship case, high-profile cases, it is a  
11 defense tactic to, if that kind of mistake can be forced  
12 or if that kind of mistake occurs, to push hard, if  
13 there is a conviction for an OPR investigation. And the  
14 U.S. Attorney and I frankly had a conversation where I  
15 said there is a good chance that with the risks of  
16 discovery that are involved here and knowing the candid  
17 defense counsel that we are dealing with, that we are  
18 going to end up sitting here in this chair where I'm  
19 sitting today.

20 We had this conversation before we presented  
21 the indictment about discovery. The U.S. Attorney did  
22 not share the concern that I had about the volume of  
23 discovery and the discovery issues that we were going to  
24 face in the case. He was, I think it's fair to say,

Steven Ruby

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1 dismissive of those concerns. We pressed forward.

2 We indictment the case around the middle of  
3 November 2014, I think, November 12th or 13th. And the  
4 initial stages of our discovery production were hectic.  
5 They are often hectic because you have a short deadline  
6 to make your initial discovery production. I think ours  
7 was due early December, the initial discovery  
8 production, December 4th or so. I was -- and I think  
9 you know this, Mark, from written submissions I made  
10 before -- [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]. So  
14 there was a really intense period of work to put  
15 together the initial discovery production between  
16 mid-November and the first week of December, [REDACTED]

17 [REDACTED]  
18 [REDACTED]  
19 Q. Just to tell you this as a compliment to you,  
20 we've heard -- this is slightly exaggerated -- [REDACTED]

21 [REDACTED]  
22 [REDACTED]  
23 A. Yes, it's --

24 Q. Those things were said with admiration?

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1           A.       That's good to know. In that initial period  
2 of gathering and producing discovery, I had another  
3 conversation, probably more than one with the U.S.  
4 Attorney about the challenges we were facing with  
5 discovery, the challenges the discovery was going to  
6 pose to the case. And his response was he wasn't  
7 worried about it because we were almost done with  
8 discovery and there wouldn't be any significant  
9 resources required for it after that.

10                   Anyways, in one of those conversations during  
11 that period of time when the U.S. Attorney made the  
12 point that as a general matter, we wouldn't need to  
13 produce anything from the post-indictment interviews,  
14 post-indictment interviews that we conducted with  
15 witnesses, unless there was something there that was  
16 exculpatory and that hadn't produced before.

17                   And the idea there was that, as a general  
18 matter, the post-indictment interviews that were  
19 conducted were going to need to be disclosed. That was  
20 sort of the Genesis of the approach that was taken,  
21 which was that post-indictment interview memos wouldn't  
22 be produced in whole, that there would be -- if there  
23 were exculpatory information that came to light in those  
24 interviews, that it would be produced.

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1 But -- and we were aware, of course, that we  
2 needed to disclose anything from a post-indictment  
3 interview if it was exculpatory, but the approach to  
4 identifying that information was an informal one. After  
5 interviews, we, the case team, would discuss -- the  
6 trial team would discuss what witnesses had to say and  
7 we regularly discussed more broadly the evidence that  
8 existed in the case.

9 And the U.S. Attorney's view, which he  
10 consistently expressed, was that there really wasn't any  
11 exculpatory evidence in the case. This is something  
12 that you all may have touched on already with other --  
13 with other folks that you've talked to, but, at this  
14 point, it might be useful to talk about the U.S.  
15 Attorney's role in the case.

16 It's unusual for, at least in my experience  
17 here, for a U.S. Attorney to be personally involved in  
18 prosecuting and trying a case. This case didn't follow  
19 the usual pattern. The U.S. Attorney decided early on  
20 that he wanted to be deeply involved in the case  
21 personally. And there wasn't any decision of any  
22 significance in the case that was made without his  
23 personal approval.

24 That was true in the earlier cases that arose

Steven Ruby

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1 from the UBB investigation, so the **Witness #30** case, the  
2 **Witness #25** case, the **Witness #31** case, and it was true with  
3 Blankenship. With Blankenship, the U.S. Attorney and I  
4 met more or less daily, sometimes many times a day. And  
5 certainly folks here in the office can confirm that  
6 during the period of time leading up to the indictment  
7 and after the indictment when I was here, that I was in  
8 his office and he was in my office multiple times daily  
9 talking about the case and making decisions about what  
10 was going to be done in the case.

11 You have mentioned that the U.S. Attorney --  
12 and I hope I'm not misquoting you, but that the U.S.  
13 Attorney said that he doesn't recall being involved in  
14 any decision about producing interview memorandum.

15 Q. Not exactly. I'll show you what he said.  
16 It's possible I misstated, but I'll show you what he put  
17 in writing for us.

18 A. And I'll comment on it at that point, but I'll  
19 say this now, and if it's responsive to what he said,  
20 say it again then. I have a specific recollection of  
21 discussing that with the U.S. Attorney, the subject of  
22 how we were going to handle post-indictment MOIs and the  
23 way in which we eventually did handle them.

24 MR. SCIORTINO: And this discussion was

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1 after indictment, but before the first big production?

2 THE WITNESS: It was during the -- so we  
3 made the first big production in early December. There  
4 were subsequent follow-up productions through the -- I  
5 would say the early part of the following year. And I  
6 don't -- I certainly in retrospect wish that I had taken  
7 detailed notes of my conversations with him, but as a  
8 practical matter, that's a difficult thing to do with a  
9 trial team.

10 BY MR. MASLING:

11 Q. And your boss.

12 A. Sure. I would put that discussion, that  
13 initial discussion, John, you know, within the two or  
14 three months after the -- and I don't have the dates in  
15 front of me, but the two or three months after  
16 indictment when we were making our intensive initial  
17 productions of discovery.

18 Q. I don't think that's -- I think it was later,  
19 but I'll show you some stuff to suggest it was later.

20 A. Okay.

21 Well -- and there were -- so to expand on that  
22 a little bit, and I'll get to this in a second, this is  
23 something that we discussed, it came up at various  
24 points during the course of the case. There came a

Steven Ruby

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1 point in the case, as you know, where the Court ordered  
2 the government to identify exculpatory material, which  
3 we were aware.

4 And in response to that order, the U.S.  
5 Attorney and I -- and my recollection is that these also  
6 involved AUSA #1 -- had lengthy discussions about  
7 what we needed to identify. We drafted a letter based  
8 on those discussions and identified the material that  
9 the group had discussed, and the U.S. Attorney reviewed  
10 the letter. He was familiar with the witness interviews  
11 that we had conducted post-indictment, he participated  
12 in many of those interviews. We discussed all of them  
13 that were of any significance.

14 And the U.S. Attorney agreed and AUSA #1  
15 also reviewed the letter and agreed that we had  
16 identified in that letter all of the exculpatory  
17 information that we were aware of and then some, that  
18 the letter had erred on the side of breath. There was  
19 at least one letter that went out with supplemental  
20 information.

21 And again, I don't remember if AUSA #2  
22 reviewed that letter. I know that I gave the U.S.  
23 Attorney the letter to review because I wanted his  
24 personal okay for it. My recollection is that AUSA

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1 AUSA #1 also reviewed the letter and again, that we all  
2 agreed that everything that was -- go ahead.

3 Q. I'm just -- do you know when was this?

4 A. This was the -- again, I wish I had more time  
5 to get my dates right before we sat down today, but this  
6 was the second letter that was sent to the defense  
7 making disclosures responsive to the Court's order or  
8 identifying evidence responsive to the Court's order. I  
9 want to say it was fairly shortly before trial.

10 Q. You are not talking about the letter  
11 disclosure?

12 A. There was a first letter disclosure and a  
13 second letter.

14 Q. Right.

15 I don't know if this is the letter you are  
16 talking about. This is the only other one I know about?

17 A. This may be it. I can look at the  
18 correspondence. I apologize --

19 Q. That's okay.

20 A. I just didn't have a chance to completely  
21 refresh my recollection on all of this, but certainly  
22 this letter was one. For the record, this is a letter  
23 dated September 10, 2015 from me to William W. Taylor,  
24 III, identifying items that the defense may claim are

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1 Brady material. And this is a letter that I reviewed  
2 with the U.S. Attorney before it went out.

3 In any event, one of the letters, and it may  
4 have been the first, the first letter that we sent out  
5 that was responsive to the Court's order to identify  
6 exculpatory material identified information from witness  
7 interviews and the specific phrasing in the letter was,  
8 if I recall correctly, and this was something that we  
9 talked, and I think I do remember it correctly, was that  
10 we were disclosing that information.

11 In other words, not just that we were  
12 identifying it as something we were pointing them to in  
13 materials that had already been disclosed, but that we  
14 were disclosing this information from witness  
15 interviews, via the letter, if that distinction makes  
16 sense.

17 Q. I got lost. Is this the June whatever letter,  
18 the initial response to the Court's order saying  
19 identify?

20 A. That sounds right. Can I take a look?

21 MR. SCIORTINO: It's the one that has the  
22 list --

23 BY MR. MASLING:

24 Q. Attached to that is a long list of Bates

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1 stamps. And the very last page has 10 or so MOI  
2 destinations?

3 A. Wasn't there -- and I'm assuming that you all  
4 studied this more recently than I have. I believe there  
5 was a letter that discussed, for example, a Massey  
6 official named **Witness #8**

7 Q. That's a different letter. This is our binder  
8 of documents, not all of which we'll talk about, but  
9 some of which. So there is a tab called OPR general,  
10 and I assume it was in some of the documents that I sent  
11 to you. Look at OPR 148 and 149. This is a letter  
12 disclosure concerning information that **Witness #8** **Witness #7**  
13 and **Witness #13** had --

14 A. This is the one I was thinking of, and I  
15 wasn't quite right about the phrasing, but the  
16 discussions, in any event -- and as I said, the U.S.  
17 Attorney reviewed this letter as well, which made  
18 additional disclosure about witnesses. And we discussed  
19 again the subject of whether we needed to disclose the  
20 entire memorandum or whether we were only required to  
21 disclose information from the memorandum that we  
22 believed to be exculpatory.

23 And his view, again, was that there was no  
24 requirement to disclose -- to disclose an entire

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1 memorandum of interview, either pre-indictment or  
2 post-indictment, but the requirement was to disclose  
3 exculpatory material, and that we had satisfied our  
4 obligation to do that with this correspondence and also  
5 satisfied the Court's direction to identify exculpatory  
6 material for the defense.

7 So those weren't the only points when we  
8 discussed that issue, but when the Court entered that  
9 order requiring disclosure of -- or identification of  
10 exculpatory material, and when we prepared these  
11 letters, again, that was the point of view of the U.S.  
12 Attorney, that we had identified in these letters,  
13 everything from our witness interviews that could be  
14 exculpatory.

15 And again, you know, it's -- you hesitate to  
16 say anything about the former U.S. Attorney or about  
17 other AUSAs who are on the trial team that can be  
18 regarded as negative information about them, but, as I  
19 said, AUSA [REDACTED] also reviewed the letters and agreed  
20 that we had identified in here everything that we were  
21 aware of that was exculpatory that he was aware of. And  
22 I certainly don't believe that he or I or the U.S.  
23 Attorney drew those conclusions in bad faith.

24 Certainly, from my standpoint, and I believe

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1 from the standpoint of the other members of the trial  
2 team who were involved, it was our belief that we had  
3 complied with the Court's order and complied with our  
4 obligations under Brady. We specifically -- and some of  
5 the questions that OPR has sent raised the issue of [Witness #13]

6 [Witness #13] We specifically discussed the issue of [Witness #13]  
7 and --

8 Q. Who is we?

9 A. Me, the U.S. Attorney and AUSA [AUSA #1] We had  
10 all been in the interviews with [Witness #13]. I don't know  
11 if everybody was in every interview, but I believe that  
12 everybody had been -- it's possible that all three of us  
13 had been in every view. At minimum, we had all been at  
14 some of those interviews.

15 Q. Nobody was at the first one. The agent went  
16 to his house.

17 A. Okay.

18 Q. But anyway.

19 A. The interviews that the U.S. Attorney's Office  
20 had conducted with [Witness #13] were the interviews that I'm  
21 referring to.

22 Q. Okay.

23 A. And had all discussed what [Witness #13] had said  
24 in the interviews with the U.S. Attorney's office, the

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1 three of us had discussed that and all agreed that what  
2 was included about **Witness #13** in the letter that --

3 Q. 9/21 letter?

4 A. Yes, that's Batesed OPR General00148 and 149,  
5 that that was the extent of exculpatory information from  
6 **Witness #13** interviews with us. By the point in the case,  
7 certainly when this letter was sent and you guys can  
8 figure out from the e-mail what the timing was of what  
9 I'm about to discuss relative to the first letter, the  
10 June letter, sometime around -- sometime in the summer  
11 of 2015, there came a point where the U.S. Attorney took  
12 even more detailed control of the case or more direct  
13 control of the details of the case.

14 He had become upset that **AUSA #1** and I had  
15 had conversations with the defense about a continuance  
16 of a trial date. After that, he called the team into a  
17 meeting, me **AUSA #1**, **AUSA #2** -- I don't remember if  
18 either of the agents were there -- into a meeting in the  
19 main conference room down the hall here in the U.S.  
20 Attorney's Office and very, I'll say, firmly told us  
21 that no decision in the case could be made without his  
22 approval.

23 And that was the basis on which we proceeded  
24 for the rest of the case, certainly, including his

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1 review of this letter. And I don't recall if the other  
2 letter, the June letter went out, the first letter of  
3 response to the Court's order, went out before or after  
4 that directive from the U.S. Attorney, but regardless of  
5 that, he certainly reviewed the first letter and  
6 expressed his view that it did identify everything we  
7 were aware of that was exculpatory.

8 The issue came up again in the testimony of  
9 **Witness #4** at trial or maybe at the end of that  
10 testimony. The defense suggested that the government  
11 had failed to disclose exculpatory information about  
12 **Witness #4** that we should have known about from  
13 discussions with **Witness #4**. We argued that issue in court and  
14 then the team discussed it over a weekend during which  
15 we briefed issues relating to **Witness #4**.

16 And at no point did the U.S. Attorney or  
17 anybody else on the team suggest that there was  
18 information from our discussions of **Witness #4** that we  
19 should have disclosed, and in particular, nobody  
20 suggested that there was any exculpatory information  
21 that we should have disclosed. On the contrary, the  
22 U.S. Attorney's position was that we had disclosed  
23 everything with regard to **Witness #4** that we were  
24 obligated to.

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1 To summarize a few points based on that  
2 history, and then we can turn to questions. Number one,  
3 to come back to where I started, nobody on the trial  
4 team ever intentionally withheld anything that any of us  
5 believed should have been disclosed. Certainly  
6 somebody, and this is true in lots of cases, somebody  
7 who reviews the decisions that we make could conclude  
8 that we made the wrong calls, but there was not any  
9 intentional wrongdoing, not on my part, not on the U.S.  
10 Attorney's part, not on the agent's part, not on the  
11 part of anybody else on the team.

12 Two, the team discussed, fairly extensively,  
13 over the course of the pretrial process, the issue of  
14 what was exculpatory from our post-indictment witness  
15 interviews and agreed that the disclosure letters that  
16 we sent included everything that was even arguably  
17 exculpatory. And the U.S. Attorney personally signed  
18 off on the completeness of those letters.

19 Three, and I'm going to be direct here. It  
20 seems that Zuckerman has tried to create the idea, and  
21 maybe I'm misinterpreting this because these are the  
22 questions you are asking me, but it seems that Zuckerman  
23 has tried to create the idea that I was making all of  
24 the decisions in this case unilaterally.

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1 Q. No.

2 A. So I'll truncate that point and say that that  
3 was not the case. The U.S. Attorney personally ran the  
4 case. And I have -- I would like to think that I have  
5 some skills as a lawyer that I think were helpful to our  
6 team at trial and pretrial proceedings, but to be  
7 perfectly blunt, I was not the discovery expert here.  
8 The U.S. Attorney had a lot more seniority, not just in  
9 terms of rank in the office, but also in time in the  
10 office than I did.

11 And I didn't make any of the decisions about  
12 disclosure of post-trial MOIs without consulting with  
13 him. I also -- and I know you all understand this, but  
14 at the same time I feel obliged to say it: I hope that  
15 you don't lose sight of the difference between how trial  
16 prep decisions look in hindsight and how they look at  
17 the time they are being made.

18 You can, in a review like this, look at a few  
19 dozen lines from a memoranda of interview and certainly  
20 conclude when you look at those in isolation that we  
21 should have done things differently, but in a real life  
22 trial and pretrial it's relentless time pressure. We  
23 were -- to the point you made earlier, Mark, [REDACTED]  
24 [REDACTED]. And

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1 I know that the defense now wants you to isolate certain  
2 aspects of the process, put them under a microscope and  
3 conclude two years later that we were corrupt  
4 prosecutors.

5 Q. That's more accurate as to what they've said.

6 A. I hope that the context in which the entire  
7 pretrial process takes place is kept in mind. I am --  
8 last, I'll say this: I'm reluctant to whine, but since  
9 I'm a subject, I'll just lay it all out there. [REDACTED]

10 [REDACTED]

11 [REDACTED] [REDACTED] [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED] [REDACTED]

18 [REDACTED] [REDACTED]

19 [REDACTED]

20 [REDACTED] [REDACTED]

21 [REDACTED].

22 [REDACTED]

23 [REDACTED] [REDACTED]

24 [REDACTED]

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1 [REDACTED] [REDACTED],  
2 but to be perfectly honest, if the Zuckerman lawyers are  
3 going to attack us for not making every decision  
4 perfectly in the context of an unbelievably high  
5 pressure case, then I would respectfully request that  
6 that be considered in the context of what I was going  
7 through at the time.

8 Q. [REDACTED]

9 [REDACTED]  
10 A. [REDACTED]11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED].  
14 Q. [REDACTED]15 A. [REDACTED] [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

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1 [REDACTED].

2 Q. [REDACTED]

3 [REDACTED]

4 A. [REDACTED]

5 [REDACTED]

6 Q. [REDACTED].

7 A. [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 Q. [REDACTED]

15 MR. SCIORTINO: [REDACTED]

16 [REDACTED]

17 THE WITNESS: So thank you for letting me  
18 put that on the record.

19 BY MR. MASLING:

20 Q. Of course. So let's -- I want to get some  
21 background. I actually don't want to start with MOIs.  
22 I want to start with the basics for exculpatory  
23 evidence, but we'll get to the MOIs. So you've given us  
24 some information in your written response about your

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1 background, but if you could just talk to us a little  
2 bit about your experience at the U.S. Attorney's Office  
3 before the Blankenship case.

4 Did you work on any matter other than  
5 Blankenship while the Blankenship investigation was  
6 going on?

7 A. Yes.

8 Q. Why don't you tell us a little bit about --

9 A. Just to give you a quick version or  
10 pre-Blankenship of pre-Blankenship: I started here in  
11 October, I believe, September or October of 2009. I was  
12 originally assigned to the drug and violent crime unit.  
13 The office of organization was slightly different then,  
14 but it was -- I don't remember exactly what the name  
15 was, but it was functionally the drug and violent crime  
16 unit. My supervision was **Witness #47**

17 **Witness #47**

18 I initially did fairly routine firearms cases  
19 for the most part, so felony possession, domestic  
20 violence misdemeanor in possession, bank robbery here or  
21 there. After -- let's see, what was the timing. The  
22 UBB explosion was in April of 2010. I had been here  
23 about six, seven months, give or take.

24 The -- at that point, Mr. Goodwin was not the

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1 U.S. Attorney, he was the -- and again, I may be getting  
2 the precise titles wrong, but functionally, he was the  
3 chief of the white collar crimes section. He had been,  
4 I'm fairly certain at that point, nominated to be U.S.  
5 Attorney. He asked me to work with him directly on the  
6 UBB investigation, and so I was involved in that  
7 investigation from the beginning at his request.

8 And the way that the office divided cases, a  
9 case like that doesn't necessarily always fit neatly  
10 into white collar or any other section. It's a  
11 workplace safety crime, which is kind of -- that was the  
12 way that it was regarded in the beginning, which is an  
13 unusual kind of case. But in the way that the office  
14 divided up cases, it fell into the purview of white  
15 collar crimes.

16 So Mr. Goodwin, then AUSA Goodwin had the  
17 case. He asked me to help him with it, and I worked  
18 with him on the investigation from the beginning.  
19 During the time that we did the UBB investigation -- so  
20 there were a number of cases, as you know, and I alluded  
21 to this earlier, arising from the UBB investigation that  
22 pre-dated the Blankenship case, and I worked on all of  
23 those.

24 I also worked on other cases while the

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1 investigation arising from UBB was going on. So there  
2 was a series of vote fraud cases in Lincoln County,  
3 which is near here that ultimately led to the  
4 convictions of three elected officials, and I handled  
5 those. There was a series of -- another series of  
6 public corruption cases in Mingo County, which is  
7 another county in our district with a longstanding  
8 political corruption problem.

9           These cases ultimately led to the convictions  
10 of four elected officials, including a sitting State  
11 Court judge. I handled those. So there was -- there  
12 were some -- there was another interesting and time  
13 consuming case that happened during the course of the  
14 post-UBB investigation with an extortioner who was  
15 sending death threat extortion letters to a series of  
16 wealthy individuals around the country, Harvey  
17 Weinstein, the movie producer, the gentleman who founded  
18 Groupon.

19           One of the victims lives part-time in this  
20 district, so his attorney reported the case to us when  
21 he got the threat. And I handled that case. We tracked  
22 down the person who was making the threats prosecuted  
23 him, convicted him. He plead, so there were a number of  
24 other large -- certainly not as large as Blankenship or

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1 the post-UBB investigation, in terms of the -- just the  
2 size of the investigation, but a number of large cases  
3 that I handled during the course of the post-UBB  
4 investigation.

5 Now, if your question is from indictment to  
6 trial, I would say that my time was at least 90 percent  
7 Blankenship. There may have been a couple other  
8 investigations that were moving along during that period  
9 of time.

10 Q. It's not a really important question. It was  
11 more for background.

12 A. Sure.

13 Q. So how many cases had you tried to verdict  
14 before you tried the Blankenship case?

15 A. Two.

16 MR. SCIORTINO: What kind of cases were  
17 those?

18 THE WITNESS: One was a counterfeiting  
19 case, counterfeit currency case. And the other was a --  
20 it arose out of the vote fraud cases that we did in  
21 Lincoln County. It was an assault on a federal officer  
22 case. So an FBI agent had gone out to investigate the  
23 vote fraud, the witness had pulled a gun on him, and we  
24 prosecuted that as an assault on a federal office.

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1 BY MR. MASLING:

2 Q. What bar or state bars are you an active  
3 member of?

4 A. New York, D.C. and West Virginia.

5 Q. This is going to sound like a loaded question  
6 in light of how we started out, but it's the same  
7 question we've asked everybody that we've interviewed so  
8 far: Based on your experience working closely with the  
9 former United States Attorney, Mr. Goodwin, did you form  
10 an opinion of his professionalism and ethics, and if so,  
11 what was that?

12 A. Look, I don't think that anyone here in the  
13 office would disagree with the view that Mr. Goodwin  
14 liked media exposure. That was a priority, certainly  
15 for him during his time in office and, you know, this is  
16 the only U.S. Attorney's Office I've worked in, but I  
17 think it's probably fair to say that he's not the only  
18 U.S. Attorney of whom that's ever been true.

19 Q. Have you ever heard of the Southern District  
20 of New York?

21 A. I have. I think I saw somebody from there on  
22 the cover of time magazine.

23 Q. Yes.

24 A. He -- I would say that the -- you know, I

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1 certainly would not call him unethical. I think that  
2 you can see from some of the correspondence that you  
3 mentioned, Mark, in an earlier discussion that there  
4 were areas where he and I disagreed about, priorities in  
5 the case. You know, I, as I said, repeatedly before  
6 indictment and after indictment approached him about the  
7 importance of making sure that we got discovery right.

8 And, you know, look, you asked the question  
9 about how many cases I tried before I did this case, so  
10 there is no point avoiding the subject. I raised it  
11 with the U.S. Attorney in conversations about discovery.  
12 I did not have a tremendous amount of experience in  
13 making the calls that we were going to have to make.

14 MR. SCIORTINO: I'm guessing the  
15 counterfeiting case and assault case had nowhere near  
16 the --

17 THE WITNESS: That is accurate.

18 MR. SCIORTINO: -- discovery issues  
19 complexity.

20 THE WITNESS: That is accurate. You know,  
21 my hope in having those conversations was that we would  
22 get more -- that I would get more help in making the  
23 calls that needed to be made in discovery, handling  
24 discovery generally because I was -- as I said before, I

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1 was deeply concerned that if there was one area of the  
2 case in which we might make a mistake that would come  
3 back and be problematic, it would be discovery, just  
4 because there were so many moving parts.

5 BY MR. MASLING:

6 Q. We heard that AUSA #1 was added to the  
7 trial team, in part, because of AUSA #1 fairly extensive  
8 experience with criminal trials and criminal discovery.

9 Is that accurate?

10 A. My view on that is that AUSA #1 was added,  
11 yes, certainly because of AUSA #1 experience, probably  
12 primarily because AUSA #1 was a good trial lawyer with a good  
13 courtroom presence who the U.S. Attorney thought would  
14 be an asset to us in trying the case. And I think that  
15 was accurate, without a doubt.

16 But, yes, I would say generally that the  
17 thinking was that AUSA #1 experience in having had -- tried  
18 many cases, having been in the office for a long time,  
19 would be beneficial in all of work that we had to do  
20 leading up to trial as well. AUSA #1 was known as a quick  
21 writer and a good writer. AUSA #1 would be able to help us  
22 with the avalanche of briefing that we expected. So,  
23 yes, I would say that's accurate.

24 Q. There is a tab in the binder, OPR Ruby, which

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1 is the materials that you have provided to us. And take  
2 a look at OPR Ruby 0003 and footnote 4. And it says, in  
3 part, "Mr. Goodwin and AUSA #1 and AUSA #2 played only  
4 minor roles in discovery matters and later on neither of  
5 the case agents played a role in discovery matters."

6 Do you think that's an accurate description of  
7 how discovery matters were handled?

8 A. Well, when I -- I thought about this. When I  
9 wrote this, what I was thinking of in terms of our  
10 discovery production was the initial phase of production  
11 where we pushed out 99 percent of the discovery that got  
12 produced in the case, the however many million  
13 documents, the --

14 Q. I heard four. Is that about right, 4 million?

15 A. Documents?

16 Q. Yes?

17 A. That seems high.

18 MR. SCIORTINO: Maybe pages.

19 THE WITNESS: Pages, yes.

20 MR. MASLING: Yes.

21 THE WITNESS: That's a reasonable number.

22 I don't remember now what the actual number was. I know  
23 the pages were in the millions. And that was certainly  
24 with regard to volume of discovery and with regard to

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1 that initial production of discovery, that was mostly  
2 done with me and Paralegal #1 our paralegal. And, you  
3 know, we -- we, at that point, you know, AUSA #1  
4 AUSA #1 if AUSA #1 was on the trial team at all at that point,  
5 AUSA #1 had only been recently added.

6 BY MR. MASLING:

7 Q. No, AUSA #1 was only February 1st, I think, of  
8 2015?

9 A. And AUSA #1 -- that initial push, like I said, that  
10 was largely mechanical. We decided we were going to  
11 push out everything essentially, the entire document  
12 database. And all of the pre-indictment MOIs, although,  
13 as it turns out, we missed some, which I'm sure we'll  
14 get to.

15 Q. Yes.

16 A. And the -- so that -- anyway, that's what that  
17 referred to, when I wrote this, what I thought of as our  
18 discovery production was this initial push of getting  
19 things out that we had had before indictment. I  
20 certainly wouldn't say that -- that's not accurate with  
21 regard to the narrower issue, which has come to be  
22 obviously a significant issue for OPR with regard to the  
23 handling of the post-indictment MOIs.

24 For the post indictment MOIs, I don't think

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1 those were at least not largely at issue in this initial  
2 response. The U.S. Attorney had a significant role in  
3 decision-making. AUSA #1, I know, reviewed these  
4 letters with me because I wanted to make sure we got it  
5 right. I would not say that AUSA #2, even after  
6 indictment, AUSA #2 role in the post-indictment memos, MOIs  
7 has been small, maybe none. I don't know, I don't  
8 remember.

9 Q. Talk to us a little bit about the general  
10 discovery philosophy leaving aside the MOI issue for a  
11 second, which I know was probably the subject of  
12 explicit discussions, but was there a, let's just give  
13 them everything, essentially open file? Was there, we  
14 are going to be selective? I mean, what drove discovery  
15 decisions, if anything?

16 A. With regard to -- so with regard to  
17 pre-indictment materials, the materials that we had  
18 before the indictment, we discussed, and at that point  
19 it was -- and you've confirmed that, and my recollection  
20 is that AUSA #1 was not part of the trial team then.  
21 The U.S. Attorney and I discussed it and decided that  
22 given the volume of documents and our relatively limited  
23 resources, what made the most sense was just to hand  
24 them the entire document database, which we did.

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1 We had an online relatively database, which  
2 was maintained out of the facility in South Carolina  
3 that we gave them and that we were going to produce,  
4 just go ahead and produce all of our pre-indictment  
5 MOIs, produce MSHA's views, the two-day transcripts of  
6 interviews with miners after the explosion.

7 There may have been -- and I don't remember.  
8 There may have been a couple of small categories that we  
9 decided were not discoverable, but for the most part, in  
10 terms of volume, 99.9 percent of the materials that we  
11 had were the online document database, and we decided to  
12 just turn that over.

13 Q. I think I sent you, among the documents that I  
14 sent, were some excerpts from spreadsheets that I  
15 believe were prepared by Paralegal #1. And you had  
16 reviewed them and you had asked Goodwin to review them  
17 to make decisions about disclose and not disclose. And  
18 so OPR General OP001 is an e-mail from Paralegal #1 to you and  
19 Goodwin saying, here's a portion of index, and then on  
20 the next page there is this bullet point I wanted to ask  
21 you about.

22 It's in the middle of page, OPR General 002,  
23 and it's got a date of -- and this was an entry that was  
24 made by Paralegal #1 8/4/2014, so pre-indictment. First

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1 sentence says, "Booth said he wants to produce  
2 everything that we have in this case," and then there  
3 was some further discussion.

4 But I wanted to ask you: Did you ever hear  
5 him say anything like that, or how would you interrupt  
6 how **Paralegal #1** had written about what Goodwin had said to  
7 her?

8 A. I assume -- let me answer both parts of the  
9 question.

10 Q. Okay.

11 A. The discussion that -- this is consistent with  
12 the discussion that Booth and I had early in the case,  
13 and then again when it came time to produce discovery,  
14 that we were going to turn over the entire document  
15 database. That is what I interpret that to mean.

16 Q. We haven't talked to him because he declined  
17 us for an interview.

18 A. Right.

19 Q. But we've heard it suggested, and it's just a  
20 suggestion -- and I don't believe they've heard from  
21 Goodwin about this, that at least somebody's interrupted  
22 this to mean the MOIs as well. It's like whatever there  
23 is in this case I want it turned over.

24 A. Right.

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1 Q. And I take it, based on kind of your  
2 introductory that you would disagree with that  
3 characterization?

4 A. Certainly. I mean, there is no question that  
5 when -- you know, this is a pre-indictment -- this was  
6 our view of what we would do with the pre-indictment  
7 materials, that we would turn over all of the  
8 pre-indictment MOIs, that we would turn over all of the  
9 pre-indictment documents in the document database.  
10 Booth's view was that post-indictment MOIs were  
11 different.

12 I -- and in the discussions that we had about  
13 how we were going to handle those, whether to disclose  
14 the entire MOI, whether to disclose only exculpatory  
15 material, his view was that we were satisfying our  
16 obligations by disclosing exculpatory materials.

17 MR. SCIORTINO: Did you argue with him?

18 THE WITNESS: No. No, I didn't. And  
19 certainly in retrospect -- I mean, look, it would have  
20 been -- in retrospect, it would have been much better,  
21 we could have avoided much of this process, if we had  
22 just handed over everything. And I don't believe that  
23 there was anything in those memos that would have  
24 affected the outcome of the case. It certainly wasn't

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1 the decision not to produce them certainly -- or to  
2 produce them in whole certainly wasn't based on a desire  
3 to hold back something from the defense that we thought  
4 would help them.

5 I think the memos are -- you know, granting  
6 that there are pieces of the memos that you can argue  
7 about, the memos as a whole are very strongly favorable  
8 to the government's case. You know, I've wondered what  
9 motivated the initial position that the U.S. Attorney  
10 took, and as I said, it came up in the course of a  
11 conversation we had about the difficulty of dealing with  
12 discovery.

13 He again, was not concerned about it, said  
14 that we didn't need to turn over post-indictment  
15 pretrial memos in their entirety. And then, you know,  
16 to some degree, and I'm drawing inferences here, but  
17 after the briefing and the case started, it seemed to me  
18 that he felt like he was under siege, and we all did to  
19 some degree, the briefing, the motion practice that we  
20 got from the defense, as often happens in these kinds of  
21 cases, it personal, they attacked us personally; they,  
22 in particular, attacked him personally and his father.

23 Asked for all of the judges in the district to  
24 be recused because his father was on the bench and

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1 eventually I think even filed a mandamus petition in the  
2 Fourth Circuit with a reproduction of his father's  
3 official painting in which there is a photograph of the  
4 former U.S. Attorney on his father's desk. And I think  
5 that -- I know that, you know, that Booth took that very  
6 personally.

7 And I think that he started, at some point, to  
8 develop a view that we are not going to give them more  
9 than we have to. He said, "we are not" -- he said those  
10 words to me at least once, but I don't think he thought  
11 that we were -- I don't think he thought that we were  
12 violating our discovery obligations. I think his view  
13 was that there was no requirement to turn over the memos  
14 in full, as long as we disclose the exculpatory  
15 information, and I didn't argue with that.

16 Q. When did he say that to you, to the best of  
17 your recollection?

18 A. It was in the -- I can't put a date on it. It  
19 was in response to -- there were a series of motions  
20 that were filed by the defense, motions to compel, and  
21 it was in the context of our discussions of the motions  
22 to compel. It was either, we've given them everything  
23 we have to, or we are not going to give them any more  
24 than we have to. Words to that effect, that, you know,

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1 there was an interest in taking a firm line with these  
2 guys.

3 You know, we opposed -- as you saw, we opposed  
4 the motion to identify exculpatory material, period.  
5 And that was his position generally, I guess, two-fold.  
6 Number one, we've given them everything we have to, we  
7 are not going to do that and, I don't think there is any  
8 meaningful exculpatory evidence in the case.

9 Q. Would you agree with me that the statement to  
10 the effect of, "we" are not going to give them anything  
11 more than we have to, seems inconsistent with how  
12 **Paralegal #1** had written what he told **Paralegal #1** which said, he  
13 wants to produce everything that we have?

14 A. Like I said --

15 Q. Things change I know, but between what you've  
16 just told us he said and what we are reading here seems  
17 not consistent to me.

18 A. What I think happened was that there was a --  
19 in his discussions with me and, as a result, in the way  
20 that I came to see the discovery, a distinction between  
21 pre-indictment, we pushed everything out in this very  
22 large initial production, and then post-indictment, we  
23 are going to -- we've done everything we are going to do  
24 and we are not going to do anymore. We've given them

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1 what we are going to give them. And not to say -- and  
2 again, it was always an understanding that exculpatory  
3 material from the post-indictment interviews would be  
4 produced, but that the full memoranda would not be.

5 MR. MASLING: Anything more on these?

6 MR. SCIORTINO: Yes, I have a couple more.

7 So there was a change in Mr. Goodwin's  
8 philosophy from pre-indictment to post-indictment, it  
9 sounds like, and you've discussed how part of that was  
10 due to the fact that things got personal with the  
11 judge's father and all of the motions you were given and  
12 everything?

13 THE WITNESS: That's -- I mean, that's  
14 not -- and I want to be clear, that's an inference that  
15 I'm drawing.

16 MR. SCIORTINO: Okay.

17 THE WITNESS: He never said to me that the  
18 -- I guess the contentious nature of the litigation and  
19 the personal sorts of motions that they have filed was  
20 the reason, specifically was the reason not to produce  
21 post-indictment MOIs in whole or not to -- to resist the  
22 motion to identify exculpatory material. He never  
23 explicitly drew that connection.

24 What I observed is that as the defense filed

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1 those motions, he took an increasingly hard line in how  
2 we were going to deal with the defense, not just on  
3 discovery, but in other matters as well.

4 Q. Did that same personal aspect of the case  
5 afflict you also, or mostly just the U.S. Attorney?

6 A. Well, I was -- I would say I wasn't pleased  
7 that they filed motions accusing us of grand jury  
8 misconduct. Nobody likes to see that kind of thing.  
9 You know, I would, but I don't think that I took it -- I  
10 don't think that I took it as person, in part, because  
11 the attacks weren't as personal -- perhaps the attacks  
12 weren't as personal with regard to me. Nobody put my  
13 picture in a brief.

14 MR. SCIORTINO: That seems to me that this  
15 approach that we are not going to give them anything we  
16 don't have to is fundamentally strategically unsound in  
17 a case such as this because there is no witness safety  
18 issues, you know that you have this big highly financed  
19 defense attorney -- defense firm that's arguing about  
20 discovery over and over again, specifically in e-mails  
21 and briefs about memorandums of interview in particular.

22 So by not giving them anything you don't have  
23 to, in effect, you are giving them something even  
24 better, which is something to argue about and something

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1 to bring up on appeal with OPR and all of this stuff  
2 where a much safer approach would be just to hand  
3 everything over all the time, which is what you do, for  
4 instance, in a capital case, when you know that there is  
5 going to be extraordinary be post-litigation scrutiny of  
6 your conviction.

7 So at the time, did anyone perceive that  
8 perhaps that this is winning the battle, but losing the  
9 war from a strategic perspective?

10 A. So I guess I would say that, you know, as I  
11 said I was very concerned about discovery from the  
12 beginning. I had -- it was one of the most significant  
13 sources of stress that I had in the course of the case.  
14 With regard to these MOIs specifically, you know, I  
15 would say it was not -- and again, this -- this may seem  
16 odd since it's now become such a point of focus, but in  
17 the course of preparing for the trial, it wasn't our  
18 perception -- and certainly we didn't do an interview in  
19 the run up for trial where we got any kind of a  
20 bombshell exculpatory revelation.

21 And I think, based on the conversations that  
22 the trial team had, everybody's perception of the  
23 pretrial interviews that we did was that there was very  
24 little exculpatory information in those. And, you know,

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1 I can't say that we -- we worked together on the letters  
2 that we were going to send, everybody reviewed the  
3 letters, signed off on the letters, but, you know, I  
4 can't say that what was happening with the  
5 post-indictment MOIs was something that we thought a lot  
6 about at the time in terms of what might raise an issue  
7 on appeal or might raise an issue on OPR. There  
8 was just -- again, when I say it may seem odd now, you  
9 take it out of context and put it under a microscope, it  
10 seems obvious that we should have had that thought.

11 MR. SCIORTINO: Here is what else seems odd  
12 to me, just having done cases where you are expecting a  
13 lot of scrutiny down the road, the approach that you are  
14 taking by not giving them anything that we don't have to  
15 is actually more work for you, right, because you  
16 described yourself as under siege, responding to all  
17 this stuff. And it's more trouble to go through 30  
18 memorandums of interviews and figure out what's  
19 exculpatory and how to summarize it fairly in a letter  
20 than just to hand it all over.

21 So why would you do that to yourself?

22 THE WITNESS: I agree with that. I'll tell  
23 that you the U.S. Attorney expressed a concern in  
24 connection with what we were going to produce and not

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1 produce, in particular, in connection, for example, with  
2 the motions to produce agent notes, that he did not  
3 think that the other side was playing fair, and I agreed  
4 with that in some ways.

5 I believed -- he certainly believed, I also  
6 believed that their briefing, many of the arguments that  
7 they made were misleading with regard to -- with regard  
8 to their factual claims. And he had the view, and I  
9 heard him say, and to be clear, I agreed with it, that  
10 anything you give these guys, they are going to twist it  
11 and distort it and find some misleading way to use it.

12 And again, that is a position that I heard him  
13 take in connection with discovery specifically. So to  
14 connect that to the question that you asked, again, in  
15 retrospect, certainly, it would have been less work to  
16 just hand these things over.

17 MR. SCIORTINO: What you just said concerns  
18 me because we are talking about memorandums of  
19 interviews here. So are you saying that there was a  
20 concern that the defense would be unfairly able to use  
21 the information in the memorandums of interviews that  
22 were not disclosed?

23 THE WITNESS: That comment was made  
24 specifically with regard to agent notes.

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1 MR. SCIORTINO: Well, presumably the  
2 memorandum and agent notes were fairly coextensive,  
3 right?

4 THE WITNESS: Yes, but, I guess, in  
5 response to your question about adding work, I think  
6 that, no, that the U.S. Attorney's stated view was that,  
7 based on what we had seen early on in the motion  
8 practice, these guys, the Zuckerman lawyers, the defense  
9 counsel, weren't going to fairly represent anything that  
10 was given to them. And so we would follow our Brady  
11 obligations and provide exculpatory material, but there  
12 was a move away from the initial -- I mean, the  
13 pre-indictment view that we were just going to produce  
14 everything.

15 And there was also a difference, I guess to  
16 come back to your point, Mark, on the difference in the  
17 statement on OPR General 2, the spreadsheet about  
18 producing everything pre-indictment, versus the -- I  
19 don't know if nuance is the right word, but the more  
20 particularized approach that was taking post-indictment.  
21 Part of that, I think, was just the reality of the  
22 volume of what had to be produced from the  
23 pre-indictment materials.

24 Again the U.S. Attorney's stated view, and

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1 this is something that he said in response to my  
2 concerns about the possibility of mistakes in discovery  
3 was there wasn't any -- there was no practical  
4 possibility that we could go through all of the  
5 pre-indictment material because there was so much of it,  
6 and make individualized decisions about what was  
7 discoverable and what was not.

8 And so pre-indictment, everything was just  
9 going to get pushed out. Post-indictment, the volume  
10 was smaller, and I would say that that accounted for  
11 some of the difference in approach.

12 MR. SCIORTINO: I have to follow-up with  
13 just one express question. Was there some concern on  
14 your part or Mr. Goodwin's part or both that there was  
15 something about the content of the post-indictment  
16 interviews, whether reflected in the notes or  
17 memorandum, that the defense was going to be able to use  
18 unfairly?

19 THE WITNESS: No. There was no -- nothing  
20 specific about that content. I wouldn't say that there  
21 was anything in there that we felt like they would be  
22 able to use unfairly. It was -- when I say that, I  
23 think that was just a generalized view on his part that  
24 they would use unfairly anything that they were given.

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1 MR. SCIORTINO: Thanks.

2 BY MR. MASLING:

3 Q. Do you want to take a break?

4 A. I'm good.

5 Q. All right.

6 I want to talk a little bit about the search  
7 for exculpatory evidence. So if you look at OPR General  
8 170 and some succeeding pages, I believe these were  
9 among the documents that I sent you within the last  
10 couple of weeks. So it appears from the e-mail and the  
11 subsequent pages that -- and we want to ask you how this  
12 came to be -- that Department of Labor attorneys were  
13 searching certain categories of MSHA e-mails and certain  
14 documents possessed by certain people for exculpatory  
15 information.

16 And this back and forth sets forth the search  
17 terms that would be used, and Mr. Goodwin is telling  
18 them general -- what would constitute exculpatory  
19 evidence. So the first question is: How did this  
20 happen? How did this come to pass?

21 Why was this search done?

22 A. The Department of Labor?

23 Q. Yes.

24 A. Why was DOL doing the search?

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1 Q. Yes.

2 A. So it -- the DOL, of course, is the parent  
3 agency of the Mine Safety and Health Administration, and  
4 again, to the best of my recollection, there had been --  
5 I don't know if this came before or after. At some  
6 point, there were motions from the defense for  
7 information from MSHA.

8 We already produced in the initial rounds of  
9 discovery a lot of information from MSHA, but, I guess,  
10 in general terms, you know, the reason that we had asked  
11 DOL, I believe that the -- and again, I don't remember  
12 all of the timing, but I believe, at this point --  
13 certainly at some point in the pretrial phase, this [REDACTED]

14 **DOL Attorney**

15 **DOL Attorney** and we had asked [REDACTED] to coordinate pretrial a  
16 review of MSHA records to see if there was discoverable  
17 material in there.

18 And I don't know if -- as to what specifically  
19 prompted this search at this time. I don't remember if  
20 there was -- if it had been a motion or a request from  
21 the defense or just a view on our part that that was a  
22 source of information that needed to be reviewed, but it  
23 was being reviewed because of MSHA's -- because MSHA had  
24 conducted their own underlying investigation.

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1 Q. I mean, do you remember there being a  
2 discussion about whether the Department of Labor was  
3 part of the prosecution team, given that there was an  
4 agent from OIG, and you had made the Department of Labor  
5 attorneys and the special assistant assisting you with  
6 the search for evidence and, therefore, you needed to  
7 see whether those folks possessed exculpatory  
8 information that needed to be disclosed?

9 A. As to whether we phrased it in exactly those  
10 terms, are they part of the prosecution team, yes, I  
11 have a recollection of discussing that internally. And  
12 the reason that I paused before I answered the question  
13 is that -- and I remember having a discussion about it  
14 with the U.S. Attorney, frankly, I can't remember where  
15 he came out on it, but we did do -- there was a search  
16 of -- and ultimately this was one phase of it.  
17 Ultimately, before trial, there was a very extensive  
18 search of any source of information at MSHA that we  
19 thought reasonably might contain exculpatory  
20 information.

21 Q. We'll talk about that in a bit. Do you have  
22 any recollection of who initialed this search? Was it  
23 folks at MSHA calling you up and saying, well, we thing  
24 we better take a look at our e-mail records or --

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1 A. No.

2 Q. -- you all from this end saying to them, we  
3 think you should be searching?

4 A. We initialed it, that much I remember. MSHA  
5 didn't call us and say -- or DOL didn't call us and say,  
6 we think we have information that you need to see, or we  
7 think we might have information that you need to see.  
8 This was something we initialed.

9 Q. Flip over to 171. And this has the proposed  
10 parameters of the search. So there is date ranges and  
11 there is district 4, headquarters, the AI team and the  
12 IR team. And what the -- this was a search for e-mails,  
13 except for the IR team, which was going to search  
14 documents and not just e-mails.

15 My question is: Do you know why only the IR  
16 team's documents were searched and not D4, headquarters  
17 and AI?

18 A. So I think from the timing of this, and I  
19 think that maybe the reason that Booth ended up  
20 answering directly is that I was out at this point.

21 [REDACTED]

22 Q. Okay.

23 A. And I think that's why Booth wound up  
24 answering it. I don't specifically -- and it's possible

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1 I responded. I don't remember responding to this e-mail  
2 from [DOL Attorney] I think that ultimately documents were  
3 searched from the AI team and headquarters. Again, but,  
4 if I were to -- and again, I will -- I don't have a  
5 specific recollection of how this decision was made, but  
6 just reasoning through it, we already had and had  
7 already produced documents from the AI team in the  
8 initial rounds of discovery.

9 And so that -- again, I'm offering some  
10 reasoning based on putting some facts together about why  
11 this decision might have made sense at the time. The AI  
12 stuff had largely already been produced.

13 Q. Flip over to 173. 173 is an e-mail from  
14 [DOL Attorney] to you March 26, 2015. And in the second line,  
15 [DOL Attorney] tells you that they've identified 936 potentially  
16 exculpatory documents.

17 And my question to you is: What happened to  
18 those?

19 A. My belief is that our team reviewed these and  
20 these were ultimately -- what we determined was  
21 exculpatory was ultimately produced in a supplemental  
22 production.

23 Q. Do you have any recollection of when that  
24 might have been?

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1 A. No. I mean --

2 Q. Or how about how many of the 936 did you  
3 all --

4 A. Well, I think we concluded that [REDACTED] was right,  
5 that most of these were not exculpatory when we reviewed  
6 them, but as to an exact -- I mean, I don't think it was  
7 close to 936, but I don't remember the exact number.

8 Q. Who did the review on this end?

9 A. There were -- so let me preface this by saying  
10 that there were multiple rounds of information that we  
11 received from MSHA, and I don't know who exactly was  
12 involved in reviewing each, but I believe at least in  
13 the review, I probably would have been involved. [REDACTED] AUSA #1  
14 [REDACTED] AUSA #1 [REDACTED] AUSA #2 and I -- and, again, I don't -- the  
15 specific productions run together, but with these MSHA  
16 productions, I discussed the results, and what we were  
17 actually going to produce and what the results of the  
18 review were with the U.S. Attorney before we finalized  
19 them.

20 Q. But I'm gathering that you don't actually have  
21 a specific recollection of this, this is more, this is  
22 how it should have happened?

23 A. Well, this is how we did the MSHA. And the  
24 reason that I'm not certain as to this one is I'm pretty

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1 sure there was more than one of these MSHA instances in  
2 which MSHA provided us information that we ultimately  
3 disclosed to the defense. And I know that AUSA #1  
4 and AUSA #2 were involved in reviewing documents from  
5 that data that MSHA had gathered.

6 Q. Look at OPR General 174. In the second  
7 paragraph it says, "Please note, you will see some twos  
8 mixed in the exculpatory materials we reviewed twos for  
9 a couple of days until we decided to put those on hold."  
10 What seems to have happened, based on this e-mail and  
11 some of the prior ones is that somebody decided we are  
12 not going to -- we are only going to research e-mails  
13 that had been sent by the recipient not that had been  
14 received -- by the e-mail account holder, but not those  
15 that had been received by the e-mail account holder.

16 And I wanted to ask you if you had an  
17 understanding of why that decision was paid and who made  
18 it?

19 A. I don't remember exactly. I don't. To be  
20 honest, I don't know. Again, trying to reason as to  
21 what happened there, I know that MSHA had difficulty in  
22 gathering information, gathering their old e-mails and  
23 so forth. I don't know if that had to do with it.

24 Q. Okay.

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1           A.       I mean we -- yes, on that one, that's the best  
2       that I can do.

3           Q.       Okay.

4           A.       I don't remember exactly what [REDACTED] referring  
5       to there or why that happened.

6                   MR. SCIORTINO:   Could there have been a  
7       redundancy issue in the sense that everything in the two  
8       box, one person could be in the one box from somebody  
9       else?

10                  THE WITNESS:   That's possible.   That could  
11       be it.   As I sit here, I can't tell you why exactly what  
12       [REDACTED] referring to or why or who made the decision.

13                  MR. SCIORTINO:   Was there ever any  
14       consideration of just turning all of this stuff over  
15       wholesale without going through this review process?

16                  THE WITNESS:   No, not that I recall.  
17       Again --

18                  MR. SCIORTINO:   Was this part of that  
19       post-indictment philosophy of only giving over what you  
20       had to?

21                  THE WITNESS:   Well, I mean, certainly the  
22       U.S. Attorney ultimately was overseeing these reviews  
23       and productions and this was just sort of the way  
24       that -- I guess I would say this was the way that it

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1 played out. I don't remember making any kind of a -- or  
2 discussing any kind of a wholesale production of what we  
3 got from MSHA.

4 Q. So we've referenced this letter before, and  
5 this doesn't have a Bates stamp. It's the June 22, 2015  
6 letter from you to Mr. Taylor, I believe, in response to  
7 the Court's order for identification of actually  
8 exculpatory material. Tell us what you remember about  
9 the process that you went through to come up with a list  
10 of materials that were attached to your letter.

11 A. We -- do you mind if I take a look --

12 Q. Of course.

13 A. -- and refresh my recollection on what we did  
14 attach?

15 \* \* \*

16 (Brief break)

17 \* \* \*

18 BY MR. MASLING:

19 Q. So we've asked **DOL SA #1** and **FBI SA #1**  
20 whether they had been asked to search for any documents  
21 in response to the Court's order to identify exculpatory  
22 materials. And **DOL SA #1** said, yes, **xxx** had been  
23 asked by you to search MOIs. So if you look at OPR  
24 General 118, doesn't seem to be the same page I'm on.

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1 118.

2 A. OPR General 00118?

3 Q. Oh, it is because I've written on mine. But  
4 before [REDACTED] we get to this page, I want to -- well, first  
5 of all, do you have a recollection of asking [REDACTED]  
6 [REDACTED] to search MOIs for potentially exculpatory  
7 materials?

8 A. We asked them -- I recall them to review their  
9 notes. I don't believe we asked them to review MOIs. I  
10 think we asked them to compare their notes with their  
11 MOIs and see if there were any -- are there any  
12 inconsistencies in the notes, anything that's in the  
13 note that's not reflected in the memos that would  
14 require us to produce the notes or to disclose some  
15 portion of the notes. That, I recall. I don't recall  
16 asking them, either of them to specifically review the  
17 MOIs and see if they thought something in the MOIs was  
18 exculpatory.

19 Q. That's what [REDACTED] told us. [REDACTED]  
20 [REDACTED] said [REDACTED] didn't recall being asked anything to  
21 do or prepare for this, so we were wondering whether you  
22 had any recollection of why, and this may be wrong, you  
23 asked [REDACTED] to undertake the search but not [REDACTED]  
24 [REDACTED]

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1           A.       Whatever we asked them, generally, if we asked  
2       one of them to do something, we asked the other one to  
3       do it. My recollection is that we asked both of them,  
4       as I said, to review the notes, but -- to compare the  
5       notes to the MOIs and see if there is anything in your  
6       notes that you failed to reflect in the MOI that we  
7       need -- could potentially be exculpatory.

8           Q.       So you see from this e-mail that [DOL SA #1] says  
9       to you, "Per our discussion, I've reviewed and attached  
10      the following, and he attaches a number of MOIs." And  
11      what he told us was that [DOL SA] believed that, arguably,  
12      these MOIs contained material that could be helpful to  
13      the defense and argued to be exculpatory.

14                  Any recollection of a discussion that I just  
15      related to you as [DOL SA #1] recalled it?

16           A.       No, I can't say I know what this is. I don't  
17      know.

18           Q.       It seems clear [DOL SA #1] right because if you look  
19      at the MOIs that were disclosed, some of them are on  
20      this list. So if you look at OPR 1222, the last page  
21      from the 6/22 letter, it's the list of MOIs.

22           A.       Okay.

23           Q.       And there were some of the ones that you  
24      identified to the defense as being potentially

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1 exculpatory, [DOL SA #1] had suggested to you might fall in  
2 that category.

3 A. Okay.

4 Q. Does that help at all?

5 A. I don't -- I honestly don't remember ever  
6 asking [DOL SA #1, FBI SA #1] to -- I don't know if I asked [DOL SA #1] for  
7 specific MOIs and this is what he sent or -- I mean, it  
8 would surprise me if I had asked [DOL SA #1, FBI SA #1] to  
9 independently draw conclusions about what they thought  
10 we ought to -- I mean, what memos they thought we ought  
11 to disclose. You know, I could imagine asking [DOL SA #1]  
12 specifically for these, but I just don't recall the  
13 conversation between me and [DOL SA #1] that led to this e-mail.

14 Q. Let's go it a different way then. So if you  
15 look at OPR General 122, that's the last page of the  
16 list of documents to identify for the defense that's  
17 potentially exculpatory. How did you come up with this  
18 list? If you want, so here is -- let me show you.  
19 These are the MOIs that has the names there and the  
20 dates of them.

21 A. Again, you know, when you scrutinize the  
22 process, you certainly wish that you had an answer that  
23 reflected more formality. My recollection -- and again,  
24 I don't remember specifically how we chose the

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1 individuals who were on this list. I remember having a  
2 discussion with the trial team in the course of our  
3 discussions about how we were going to respond to this  
4 court order, and we talked about those documents, what  
5 documents do we know of that we need to disclose, what  
6 categories of documents can we describe that we should  
7 identify.

8 So to correct what I said previously, we were  
9 talking here about identification, pointing out  
10 potentially exculpatory information that we should  
11 identify in response to the court order. We had  
12 conversations about specific, you know, are there  
13 witnesses who said things to us that we need to identify  
14 in response to this court order, and there certainly  
15 were names that -- on here that I remember coming up  
16 during the course of that conversation.

17 So -- and at this point, I don't remember  
18 specifically what it was that we thought these witnesses  
19 might have said, but I recall **Witness #27** was a name  
20 that we discussed and somebody we interviewed not too  
21 long before the indictment that we believed ought to go  
22 on the list, even though, again, the U.S. Attorney's  
23 view was that there was nothing truly exculpatory in  
24 there.

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1           **Witness #23**, again, was somebody who -- I  
2     can't remember the reason, but it essentially was a  
3     discussion among the trial team of this is a person who  
4     said something that we ought to flag in this letter that  
5     we were going to send out. There was not, to be  
6     clear -- and maybe this contrast will clarify what I'm  
7     trying to say.

8           There was not a process where we sat down and  
9     reviewed every single memo de novo or from scratch and  
10    tried to sort out or go back and, you know, look at each  
11    and every one of the thousand MOIs or whatever that had  
12    already been produced. It was based on discussions that  
13    we had as a trial team and we felt like, at that point,  
14    we knew the evidence well enough that we were in a  
15    position to make those calls.

16       Q.     Okay.

17           MR. SCIORTINO: It's kind of a Monumental  
18    task that the judge gave you.

19           THE WITNESS: In our view it was, you know,  
20    given the timing requirement, there was just no possible  
21    way to go through every document in the case and  
22    individually, you know, take a look at each one and  
23    discuss whether or not this is something that we have  
24    to -- that we can identify or not.

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1 MR. SCIORTINO: Yes, and you have to crawl  
2 inside the defense's mind and decide what they -- it was  
3 a strange project.

4 THE WITNESS: Yes, we thought so as well.  
5 And we felt like, given the circumstances, we felt like  
6 we did the best we could to respond to what she asked us  
7 to do.

8 MR. MASLING: You done?

9 MR. SCIORTINO: Yes.

10 BY MR. MASLING:

11 Q. Flip to OPR General 182, please. So I want to  
12 can you if our guess about this is right. So September  
13 2015, again, the Department of Labor attorneys are  
14 searching through some documents to potentially identify  
15 some exculpatory material. And our assumption was that  
16 in response to the early returned subpoena that had been  
17 filed by the defense and the subsequent production of  
18 70-some-odd thousand documents in response to that  
19 subpoena, that the prosecution team decided we should  
20 look at those documents and see what's in there.

21 Is that right, to the best of your  
22 recollection, or is this something else entirely?

23 A. Let me see what's attached. Are these  
24 attachments --

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1 Q. Yes, so the 184 through whatever it is the  
2 chart that had been attached with the identification of  
3 the potentially exculpatory documents.

4 A. So trying to reconstruct that episode in the  
5 case, there was -- I know the subpoena you are referring  
6 to. There was an early return subpoena, which I believe  
7 we agreed -- I believe we agreed we would respond to or  
8 MSHA agreed to respond to. And our view was that it  
9 was -- it was overbroad.

10 I mean, it swept in a lot of documents that  
11 didn't really have anything to do with the case, which  
12 we obviously, when you've got that subpoena, then what's  
13 responsive is what's responsive to what they are asking  
14 for rather than what might be more narrowly relevant to  
15 the case. There was some effort certainly to figure out  
16 what in that large set of documents might actually bear  
17 on the case. How we actually implemented that, I can't  
18 say I recall precisely.

19 Q. Does reviewing these e-mails and the chart  
20 help at all?

21 A. I don't know. I don't know where -- I don't  
22 know who said -- who identified these, who marked these.  
23 It looks like it was probably somebody at DOL.

24 Q. I think it was **DOL Attorney** Well, on 183 **DOL Attorney**

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1 says, column H is [REDACTED] recommendations and [REDACTED] notes, but  
2 whether [REDACTED] made the initial cut, I don't know.

3 The ultimate question is: Do you have any  
4 recollection of what happened to the documents that were  
5 identified in this chart as potentially exculpatory?

6 A. No. I'd have to try to reconstruct it.  
7 Sitting here, I don't know what we did with these. At  
8 this point, we were --

9 Q. Pretty close to trial?

10 A. Yes.

11 We were weeks out, and trying to deal with  
12 this massive production that -- last-minute production  
13 that we were making of the MSHA documents that were  
14 mainly MSHA documents and doing all the other things  
15 that you have to do right up to trial. As I sit here, I  
16 just don't remember where this went.

17 Q. Okay.

18 A. I don't know -- yes, I just don't know.

19 Q. Okay.

20 Before we turn to MOIs, we spent a little time  
21 talking to folks about the initial set of Zuckerman  
22 allegations, and I just want to ask you some questions  
23 about those. So one of --

24 A. So let me --

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1 Q. Sure.

2 A. Some of these -- and I'm trying to figure out  
3 where these went, I do see, based on **DOL Attorney**  
4 descriptions here, documents that it looks like went  
5 to -- I mean, certainly that the defense got because  
6 there are documents described on here that were used at  
7 trial. So, for example, the -- on OPR General 190, the  
8 biggest bully on the block document, the defense got  
9 that because that was mentioned at trial, I believe, an  
10 exhibit that was used at trial but certainly mentioned.

11 So yes, I'd have to try to sit down and  
12 reconstruct it to see how these got to the defense, but  
13 certainly, just based on flipping through it, there were  
14 documents that went through that did go to the defense.  
15 I'm sorry, I interrupted you.

16 Q. No, no, that was an important point. One of  
17 Zuckerman's initial allegations was that the government  
18 had intentionally withheld exculpatory evidence based on  
19 their inference that there should have been more e-mails  
20 between MSHA inspectors. In response, you told us there  
21 was a policy that MSHA had that discouraged MSHA  
22 inspectors from communicating by e-mail, and that their  
23 findings were supposed to be restricted to the actual  
24 official MSHA documents.

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1 We asked **DOL SA #1** and **AUSA #2** and  
2 **FBI SA #1** about that and all three of them said  
3 they'd never heard of such a policy, which is a little  
4 surprise, especially from **DOL SA #1** because **DOL SA #1** comes  
5 from the Department of Labor. **AUSA #1** remembered you  
6 making that statement, so I wanted to ask you: Where  
7 did that come from?

8 Is there somebody at MSHA that we can ask  
9 about that, just to nail that down?

10 A. That came from **DOL Attorney**

11 MR. SCIORTINO: That's easy.

12 THE WITNESS: And I don't remember if **DOL SA #1**  
13 ever showed it to me or not, but we had -- we discussed  
14 that fairly extensively and **DOL SA #1** said, look, you are not  
15 going to find a lot of e-mails that are specific -- that  
16 are enforcement specific. You'll find some dirty jokes  
17 and --

18 MR. SCIORTINO: And football scores.

19 THE WITNESS: Right, but they are  
20 instructed to generally refrain from having casual  
21 e-mail conversations about enforcement matters because  
22 MSHA wants everything to be in the official documents  
23 that go with an inspection.

24 MR. SCIORTINO: Is that a written policy?

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1 THE WITNESS: I don't know. My impression  
2 from him is that it was, but, again, as I sit here, I  
3 can't recall whether it was in writing or if I asked to  
4 see it. I don't remember, but that information came  
5 from **DOL Attorney** .

6 MR. MASLING: Zuckerman drew a negative  
7 inference from the fact that no MSHA inspectors  
8 testified at trial, and said that's obviously because  
9 they would have said something that would have hurt  
10 their case. And your response was, no, we didn't want  
11 to put on anybody who was a representative of the  
12 federal government before a jury in West Virginia and  
13 the same information could come in through the miners.  
14 I'm now blanking on who didn't remember that and who did  
15 remember that. Three of them did and one of them did,  
16 and I don't remember who now.

17 MR. SCIORTINO: I think that -- hang on,  
18 I'll tell you.

19 BY MR. MASLING:

20 Q. The question is going to be: Who can we ask  
21 besides, the folks we interviewed so far and the U.S.  
22 Attorney won't talk to us, to nail that down?

23 A. As to why we didn't call them?

24 Q. Yes.

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1           A.       That's a -- I don't know if the agents would  
2 know this or not. That was -- and the only other person  
3 who is probably going to have -- who participated in  
4 those conversations would have been Booth, would have  
5 been the U.S. Attorney. But that was -- I mean that  
6 was -- it was clear to us from the beginning that -- and  
7 certainly the U.S. Attorney and I had these  
8 conversations.

9           I feel -- and I don't have a specific  
10 recollection, but we talked about it enough that I would  
11 think that at least one of the other AUSAs would have  
12 been involved in these conversations. One of our  
13 challenges in doing this case, we knew from the outside  
14 there was going to be hostility toward the federal  
15 government in Southern West Virginia. And --

16                   MR. SCIORTINO: **FBI SA #1** agreed. **FBI SA #1**  
17 was the one who corroborated that.

18                   MR. MASLING: **FBI SA #1**

19           THE WITNESS: And in particular, it's even  
20 more pointed than just hostility toward the federal  
21 government. It's specifically a view that's widely held  
22 in Southern West Virginia that the federal government is  
23 responsible for the difficulties that the coal industry  
24 is having, and that the coal industry is overregulated,

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1 specifically.

2 And we believed that this was that this case  
3 would be cast, and to some degree it was, as part of the  
4 Obama administration's "war on coal," which is a theme  
5 that recurs in political campaigns here in West  
6 Virginia, that we knew a lot of jurors would be familiar  
7 with that phrase and it would resonate with them.

8 And to the extent possible, we thought that  
9 the right strategic decision was to try to avoid putting  
10 a witness on the stand who, on cross-examination, would  
11 unavoidably be taken through lines of questioning that  
12 suggested that MSHA is just anti-coal, that they are  
13 overregulating mines in a way that -- you know, it's a  
14 natural theme, right, MSHA overregulates.

15 It's a theme that they could absolutely  
16 legitimately ask if you put an MSHA inspector on the  
17 stand to try to explore the question of whether MSHA's  
18 regulations are heavy-handed or excessive, but that's  
19 something that is 100 percent guaranteed in Southern  
20 West Virginia to resonate with jurors in a way that  
21 touches themes that go beyond the case and go to the  
22 idea that the federal government is regulating the coal  
23 industry out of business. That was the concern, and  
24 that's something that we talked about.

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1 Q. Okay.

2 A. And certainly the U.S. Attorney and I talked  
3 about it many times. It sounds like **FBI SA #1** -- I  
4 mean, we didn't involve the agents in all of the  
5 discussions about trial strategy, but it was -- that  
6 concern was -- was probably our principal concern in the  
7 case, so I'm sure that's something that I would have  
8 discussed with **FBI SA #1**. We viewed -- certainly I viewed and  
9 discussed with the U.S. Attorney, and I think others on  
10 the case team would recall this.

11 We viewed the case -- the real difficulty in  
12 the case as the likelihood that many jurors here would  
13 view it as a referendum of whether you are pro-coal or  
14 anti-coal, whether than focusing on the merits of the  
15 case itself. And to a large degree, I believe that's  
16 what happened. You know, it's hard to overstate. And I  
17 think if you don't live here, it may be hard to  
18 appreciate how strongly the fate of the coal industry  
19 influences the political conversation and the economic  
20 conversation.

21 And with -- like I said, with that being the  
22 overarching strategic concern that we had about trying  
23 the case, that it was going to come about when you are  
24 pro-coal or anti-coal, as opposed to what the evidence

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1 shows. We just thought that it did not make sense to  
2 put somebody on the stand who was going to be cast as  
3 the bogeyman, who is driving the coal industry out of  
4 business.

5 MR. SCIORTINO: FBI SA #1 also  
6 said that had you called the MSHA inspectors, their  
7 testimony would have been broadly consistent with the  
8 miner's testimony.

9 THE WITNESS: That's right. We were  
10 prepared for what they were going to say. They wouldn't  
11 have been bad for us as witnesses. In some ways --

12 MR. SCIORTINO: In terms of the content?

13 THE WITNESS: Yes. In some ways, in terms  
14 of the substance of their testimony, I regretted that we  
15 couldn't call them because many of them would have been  
16 devastating in terms of what they observed at that mine  
17 and that they -- the citations that they wrote, same  
18 citation over and over and over again, just to see what  
19 they were doing disregarding -- the brazen lawlessness  
20 that they saw was taking place there.

21 But all of that information we could get from  
22 the miners. And having it come from a miner who is  
23 affiliated with the company as opposed to a fed, there  
24 is just no contest there. But FBI SA #1 was right. We talked

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1 to -- we had anticipated -- I think they put -- they,  
2 the defense, put inspectors on their witness list, so we  
3 had to go talk to them and see what are you going to say  
4 if you get called.

5 And yes, there weren't any of them that I  
6 would have been concerned about in terms of the  
7 substance of their testimony. It's just, you know,  
8 these Zuckerman guys are good cross-examiners. We  
9 had -- I think I said this in one of my responses, we  
10 had **Witness #24** (ph) on the stand, who was a financial  
11 guys -- I think it's **Witness #24** -- from Massey and Eric  
12 Delinsky at Zuckerman managed to get President Obama's  
13 name into the cross-examinations like 25 times over  
14 objection, which is just -- if you -- president Obama's  
15 approval rating in West Virginia is probably about 10  
16 percent. So, you know, we knew pretty well --

17 BY MR. MASLING:

18 Q. Just for the record, in Washington, D.C., it's  
19 like 98 percent.

20 A. So we knew pretty well that if we put one of  
21 these guys up, they were going to be turned into a  
22 symbol of federal government excess.

23 MR. SCIORTINO: I think we covered that.

24 BY MR. MASLING:

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1 Q. OPR General 201 and 202. This has been -- I  
2 don't know, we call it the applaud letter. One of the  
3 Zuckerman allegations was that this letter was not  
4 produced during discovery, it's exculpatory, and then  
5 made the inference, well, it had to to be intentionally  
6 withheld. And you told us in your written response, and  
7 we asked you about it, that you had never seen a  
8 document that once you saw it, you had an extensive  
9 search conducted for it but nobody could actually find  
10 it in the MSHA files.

11 A. Correct.

12 Q. So my first question is -- I couldn't -- I had  
13 your e-mail accounts and e-mail accounts of other folks.  
14 I did not get e-mail accounts for the agents because  
15 it's too much trouble, and probably wouldn't have gotten  
16 it from the Department of Labor, but I couldn't find any  
17 e-mail exchanges about this letter at this time. There  
18 is something early, but at this time, I couldn't find  
19 anything about it.

20 So what's your recollection of who you asked  
21 to search for it?

22 A. DOL Attorney DOL Attorney was our contact, our  
23 principal contact. There were a couple of others that  
24 we dealt with, but DOL Att was our principal contact for

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1 information that we wanted DOL to search for. And we --  
2 for better or for worse, probably for worse, in this  
3 case, I don't do a whole lot of substantive  
4 communication by e-mail. Usually, if somebody is down  
5 the hall from me I go see them. If they are not, I tend  
6 to pick up the phone.

7 Q. Okay.

8 A. But I certainly recall that we -- when this  
9 allegation came up -- I think this came up in pretrial  
10 motion practice.

11 Q. Right. This is attached to a September 17,  
12 2015 motion, so it's pretty late

13 A. And we asked **DOL Attorney** did we miss this, where  
14 is this, do you have a copy of it? And they had a  
15 search done at district 4 where this **Witness #9**

16 **Witness #9**

17 Q. Right.

18 A. And just couldn't find it.

19 Q. So as it turns out, you all knew about this  
20 before. I'm not sure if you've seen it before, but you  
21 knew about it before. So take a look at OPR 162. I  
22 don't want to be accused of hiding anything. This was  
23 among the documents I sent you.

24 A. Sure. I hear you.

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1 Q. This is an e-mail from AUSA #2 to you, August 22,  
2 2014. We obtained only yesterday AUSA #2 note from this  
3 meeting from which this e-mail derives, and apparently  
4 was a meeting with Witness #10 attorney without Witness #10 being  
5 present. So take a second and take a look at this  
6 e-mail.

7 A. Okay.

8 Q. Does this refresh your recollection at all of  
9 when -- and it's clear from this e-mail and from AUSA #2  
10 notes, which I'll show you in a second, that you didn't  
11 actually have the letter, but it was being described to  
12 you Witness #10 attorneys. And, of course, the letter is a  
13 Witness #9 letter to Witness #10 saying -- applauding the hazard  
14 elimination program.

15 Does this refresh your recollection at all  
16 about when you might have learned about the existence of  
17 the letter?

18 A. Honestly, I don't remember it. I don't  
19 remember this e-mail. I don't remember that coming up  
20 in a discussion with Witness #10 lawyers. I'm not disputing  
21 what AUSA #2 saying. I mean, AUSA #2 clearly got a detailed  
22 account of it here.

23 MR. SCIORTINO: What was Witness #10 situation?

24 THE WITNESS: Witness # wanted -- I believe the

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1 situation with **Witness #10** is **Witness** wanted immunity and we  
2 wouldn't give it to **Witness #10**

3 MR. SCIORTINO: Can you provide more  
4 context?

5 THE WITNESS: You mean as to why?

6 MR. SCIORTINO: What was your interest in  
7 **Witness #10** What was **Witness #10** concern about being in jeopardy?

8 THE WITNESS: **Witness #10**  
9 **Witness #10**

10 MR. SCIORTINO: **Witness #10**  
11 **Witness #10**

12 THE WITNESS: **Witness #10**  
13 **Witness #10**

14 **Witness #10**  
15 **Witness #10**

16 **Witness #10**  
17 **Witness #10**

18 **Witness #10**  
19 **Witness #10**

20 **Witness #10**  
21 **Witness #10**

22 **Witness #10**  
23 **Witness #10**

24 **Witness #10**

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1 [Witness #10] [REDACTED]

2 [Witness #10] [REDACTED]

3 [Witness #10] [REDACTED].

4 [Witness #10] [REDACTED]

5 [Witness #10] [REDACTED]

6 [Witness #10] [REDACTED]

7 [Witness #10] [REDACTED] I

8 don't -- to come back to your question, Mark, you know,  
9 I just don't remember. I don't remember seeing the  
10 letter and I don't remember this discussion of the  
11 letter.

12 BY MR. MASLING:

13 Q. I don't think you saw the letter. I think  
14 it's pretty clear you didn't see it, but you learned  
15 kind of the basic fact about the letter, which is you  
16 having [Witness #9] [REDACTED] saying I think that your  
17 hazardous elimination program is a good thing.

18 A. Right.

19 Q. And I applaud your effort. And [AUSA #2] [REDACTED] quoting,  
20 I think, from what -- [Witness #10] [REDACTED] lawyers description to you  
21 in this meeting.

22 A. Again, I just have zero recollection of it.

23 Q. Okay. So as I said, I hadn't sent these to  
24 you because we didn't have them until yesterday. These

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1 are AUSA #2 notes that AUSA #2 made at the meeting. And  
2 after reviewing the notes, we understand that this is  
3 before the indictment, but it raises a concern, after  
4 reviewing the notes, that the information in here was  
5 arguably helpful to the defense, and there should have  
6 been some disclosure based on what Witness #10 lawyers told  
7 you.

8 There was no -- this was just a lawyers'  
9 meeting so there was no MOIs that came out of this, but  
10 it raises the issue of whether there maybe should have  
11 been a letter of disclosure. Witness #10 suggested a  
12 20-percent reduction. They had this -- they wanted to  
13 reduce violations. Don Blankenship responded with 50  
14 percent. So that, one might argue, would be helpful to  
15 the defense.

16 Mine Act of 2009 changed, Blankenship  
17 increased interest in violations at Massey after that  
18 change. Witness #10 believes Massey's mines were safe. The  
19 accident -- there was a focus on accidents instead of  
20 violations. Witness #10 believed if you fixed 75 violations,  
21 MSHA would fine 75 more; zero violations are  
22 unrealistic; 100 percent reduction is not an option;  
23 violations are not related to safety; inspections are  
24 subjective; MSHA is harder on Massey than any other

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1 mines, and it kind of goes on in that theme.

2 So the question is: Do you ever recall  
3 thinking, after hearing what the lawyers had to say to  
4 you, in that argument, and then there was this present  
5 slide presentation apparently where they made this  
6 presentation to you. I assume the point was, give our  
7 [REDACTED] immunity, and then you can have access to them. Do  
8 you recall ever thinking, we need to make a disclosure  
9 based on what they just told you. I'm happy to show  
10 this to you.

11 A. That's fine. With regard to that, I remember  
12 we had a meeting with them. What I remember from the  
13 meeting is that they wanted immunity, we wouldn't give  
14 it to them. I don't remember -- I don't remember a  
15 discussion one way or another about the substance of the  
16 meeting, other than their demand for immunity and our  
17 view that we weren't going to grant it. I just don't.

18 MR. SCIORTINO: Was part of the reason that  
19 you were not interested in granting immunity is because  
20 [REDACTED] was not going to be a helpful witness? It sounds  
21 like [REDACTED] would not be a helpful witness to the  
22 prosecution.

23 THE WITNESS: We thought -- no. I  
24 thought -- my recollection is that [REDACTED] would have had

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1 value to us in that he could put on Blankenship  
2 everything that -- you know, he could put on Blankenship  
3 a lot directly, if he -- based on -- we didn't get to  
4 talk to him, but based on correspondence that we had and  
5 telephone recordings that we had. [REDACTED] wouldn't have been  
6 a perfect witness, but my recollection was that [REDACTED] was  
7 somebody that I would have liked to have testified.

8 [REDACTED] Witness #10

9 [REDACTED] Witness #10

10 [REDACTED] Witness #10

11 [REDACTED] Witness #10

12 [REDACTED] Witness #10

13 [REDACTED] Witness #10

14 [REDACTED] Witness #10

15 MR. SCIORTINO: I'm just asking this  
16 question because I was never faced with this situation,  
17 and I really don't know the answer to it. But say that  
18 you are in a meeting with a potential witness' lawyers  
19 and the witness' lawyers convey to you secondhand  
20 exculpatory information that you don't hear in the  
21 witness itself and you kind of hear it through their  
22 lawyers. What is your obligation with respect to the  
23 information?

24 Does it change as opposed to hearing it

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1 directly from **Witness #10** himself?

2 THE WITNESS: So --

3 MR. SCIORTINO: I was never confronted with  
4 that situation before.

5 THE WITNESS: So I would -- to give you  
6 probably a good accurate answer to that question or an  
7 answer that I'm confident in, I would have to consult  
8 some sources of authority, but -- well, about this, I'm  
9 just going to say, as I sit here right now, without  
10 thinking about it a little further, I don't want to give  
11 you an inaccurate answer.

12 And again, I just -- I don't think, as a legal  
13 matter, as a matter of department policy, I'm sure you  
14 guys know the answer to that. I'm not sure I do, if it  
15 makes a differences or not.

16 MR. SCIORTINO: Would Don Blankenship have  
17 had access to this information separately from those  
18 notes, do you think?

19 THE WITNESS: Yes. I mean, just about  
20 everything in here was information that -- the hazard  
21 elimination program was covered in exhaustive detail in  
22 what we disclosed.

23 MR. SCIORTINO: Would Blankenship have  
24 known that **Witness #10** was broadly in his corner, I guess?

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1 THE WITNESS: That, I assume so. I mean,  
2 they were close.

3 MR. SCIORTINO: Was **Witness #10** on the defense  
4 witness list.

5 THE WITNESS: Yes, **Witness #** was. I assume, you  
6 know, that Blankenship had access to this information,  
7 but, you know, there are certain witnesses that I know  
8 for sure that defense counsel had extensive  
9 conversations with. I don't know for sure what they  
10 talked -- as I sit here -- I may have known at some  
11 point, but as I sit here, I don't know if they talked to  
12 **Witness #10** or not.

13 I mean, he certainly knew -- he had had enough  
14 conversations with **Witness #10** over the years, and enough  
15 correspondence that was reflected in the disclosures to  
16 know that **Witness #10** had said things that indicated that **Witness #**  
17 believed that MSHA was against Massey or was harder on  
18 Massey than other people that Massey's mines were safe  
19 and so forth. So there were disclosures made in the  
20 form of correspondence documents telephone recordings.  
21 There were a number of telephone recordings with **Witness #10**  
22 that would have informed Blankenship that **Witness #10** had  
23 those views.

24 BY MR. MASLING:

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1 Q. OPR General 203 is impossible to read. I'm  
2 not going to read it. So this is one of the documents  
3 in the 70,000 that was produced pursuant to the early  
4 return subpoena. And again, Zuckerman said, well, this  
5 wasn't disclosed to us before we subpoenaed it and,  
6 therefore, it was intentionally withheld. It's the top  
7 bullet from **Witness #11**

8 A. Yes, I remember this one.

9 Q. The mine road appears -- the roof appears  
10 solid, section is very clean and well-kept, the  
11 ventilation controls are up, the condition of the mine  
12 is very good and management is trying very hard to  
13 improve the condition of the mine. They are doing a  
14 good job.

15 So did you ever figure out why your earlier  
16 discovery productions didn't include this document?

17 A. I don't believe we had it.

18 Q. Did you figure out why you didn't have it?

19 A. We had, early on, asked -- well, so, yes, I do  
20 know the answer to why we didn't have it.

21 Q. Okay.

22 A. We had asked MSHA for their -- all of their  
23 files in district 4 regarding the inspections of the UBB  
24 Mine. What I think happened here, and I could be wrong

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1 because I do not have the whole thing in front of me,  
2 but I think this was a spreadsheet that had information  
3 about lots of mines, not just UBB, and I don't  
4 believe -- I mean, I assume that somebody there  
5 concluded that because -- it wasn't in what they  
6 regarded as their file of UBB information or their  
7 information about UBB because it was somewhere else in  
8 the organization.

9 It was a spreadsheet that somebody -- I don't  
10 know who kept it or how it was compiled, but it was a  
11 spreadsheet that collected information on lots of mines.  
12 We did, I believe, and I think I pointed this out in my  
13 written response, produce his notes that seem to have  
14 resulted in the information that's reflected here. That  
15 was turned over.

16 Q. It's not coextensive, but it's close?

17 A. Yes.

18 Q. With the applaud letter -- well, I'm calling  
19 applaud letter, you had asked **DOL Attorney** to try and figure  
20 out why you hadn't got that before.

21 Do you remember making a similar request to  
22 **DOL Attorney** about why this bullet wouldn't have been in  
23 there, or was it clear based on what you told us?

24 A. I don't think I did. I think I concluded that

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1 the reason we hadn't gotten it was because it had been  
2 mixed in with a spreadsheet that had information about  
3 many mines in the district, maybe every mine in the  
4 district.

5 Q. MOIs.

6 A. Can we take a restroom break?

7 Q. Of course.

8 \* \* \*

9 (Brief break)

10 \* \* \*

11 BY MR. MASLING:

12 Q. So I want to go blow by blow through decision  
13 by decision, but before we do that, I want to tell you  
14 generally what we've been told, and then get your  
15 response. And you are not going to be -- the question  
16 is do you have a response. So **DOL SA #1** -- correct  
17 me if I'm wrong, this is the best to my memory. **DOL SA #1**  
18 **DOL SA #1** said **DOL SA** was shocked that all MOIs weren't  
19 disclosed. **AUSA #2** said **AUSA #2** had no idea no MOIs were  
20 disclosed. **AUSA #1** said **AUSA #1** had no idea no MOIs were  
21 disclosed. **FBI SA #1** said **FBI SA** had no idea no MOIs  
22 were disclosed except for one, which was one that **FBI SA** had  
23 prepared during trial, and **FBI SA** had a conversation with  
24 you in which you said we are probably not going to

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1 produce this because it's a trial prep session and not  
2 to gather facts.

3 MR. SCIORTINO: I think [REDACTED] said work  
4 product or something like that.

5 MR. MASLING: Maybe.

6 BY MR. MASLING:

7 Q. And we'll get to what Goodwin said in writing  
8 in a second.

9 So do you have a response to what they told  
10 us?

11 A. As to what the agent said, I don't know that  
12 we discussed with them what we were disclosing or not  
13 disclosing. And I don't know that AUSA #2 would have  
14 known what was being disclosed or not. I'm surprised --  
15 you know, like I said, I recall discussions with AUSA #1  
16 AUSA #1 and with the U.S. Attorney in a group setting  
17 about our approach to handling these memos, so it --

18 MR. SCIORTINO: Do you mean the  
19 post-indictment?

20 THE WITNESS: The post-indictment MOIs. So  
21 it surprises me to hear AUSA #1 say that. Certainly, my  
22 belief at the time was that AUSA #1 understood that we were  
23 not producing these things in their entirety and were,  
24 instead, making disclosures via letter of what -- I

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1 mean, it's cetera just hard to imagine, [REDACTED] reviewed the  
2 letters.

3 BY MR. MASLING:

4 Q. [REDACTED] said [REDACTED] didn't. We showed [REDACTED] the letters.  
5 Well, there was only one real letter, the September 21,  
6 2015 letter that describes what [REDACTED] [REDACTED] and [REDACTED]  
7 had said, at least in part.

8 A. Right.

9 Q. And we showed that letter to [REDACTED] and to [REDACTED]  
10 and the agents, and all of them denied having ever seen  
11 that before. We searched the e-mail accounts of the  
12 folks in the U.S. Attorney's Office and there is no  
13 evidence that you -- unlike the practice with briefs,  
14 which went back and forth by e-mail, there is no  
15 evidence that that letter was sent to anyone, as far as  
16 we can tell. And I think the e-mail records are  
17 complete.

18 A. It doesn't surprise me that I wouldn't have  
19 e-mailed it. Like I said, it's short enough that -- I  
20 don't recall specifically how I showed it to the U.S.  
21 Attorney or to [REDACTED], but I do recall asking for  
22 their input on it. And I'm not saying that [REDACTED] is  
23 lying. That one was in the last stages of the run up to  
24 trial.

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1 But I wanted to get [AUSA #] input and the U.S.  
2 Attorney's input on those letters because -- in part  
3 because -- in a substantial part because they dealt with  
4 discovery and I had significant concerns about, as I  
5 said, discovery in the case and making sure that we  
6 didn't fall into a trap somewhere. I mean, did they --

7 Q. Do you recall [AUSA #1] or Goodwin making changes  
8 or edits to the September 21, 2015 letter?

9 A. I don't remember if they did or not. I think  
10 honestly, you know, my general recollection on these  
11 letters was that they looked at them and said more or  
12 less, I think that's fine, looks good. I don't remember  
13 getting edits from them. As best I can recall on that  
14 issue, they agreed with both of those letters that were  
15 responsive to the June letter and the September letter  
16 as they were written.

17 Q. So [AUSA #] said to us [AUSA #] was pretty sure that [AUSA #]  
18 never saw the letter because -- I mean [AUSA #] seen it  
19 since because [AUSA #] been dealing with this stuff, but [AUSA #]  
20 never heard of [Witness #8] And if [AUSA #] had heard of [Witness #8] [AUSA #]  
21 would have said, I want to see the MOI. [AUSA #] now  
22 reviewed the [Witness #8] MOI and has said to us [AUSA #] thought  
23 that the description in the September 1st letter was  
24 inaccurate and misleading?

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1           A.     I don't know -- again, I'm sorry to hear AUSA #1  
2     say that. That description is a memorable description.  
3     I don't know if I -- I don't specifically recall or  
4     recall specifically discussing Witness #8 with AUSA #1 I  
5     recall specifically discussing Witness #8 with the U.S.  
6     Attorney.

7           Q.     AUSA #1 wasn't at Witness #8 interview, it was you and  
8     Mr. Goodwin, I believe, who were at Witness #8 interview.

9           A.     I recall specifically discussing Witness #8 with  
10    the U.S. Attorney and that -- and the description that's  
11    in the Witness #8 letter is -- the description that's in the  
12    letter regarding Witness #8 is -- I don't know what the right  
13    word for it is, but it's a pretty specific  
14    characterization of what Witness #8 told us and that one, I  
15    discussed with the U.S. Attorney and said, in substance,  
16    are you okay with this. Do you think this is -- does  
17    this captures what Witness #8 told us. And we discussed what  
18    Witness #8 had said to us and he was fine with it. He agreed  
19    with the description.

20          Q.     Let me show you the only communication we've  
21    had with the former U.S. Attorney. Here's the letter  
22    that he sent us. Take a look at that and if you care to  
23    respond to what it says.

24          A.     Yes.

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1 All I can say to that is that we specifically  
2 discussed how we were going to handle the post-trial  
3 MOIs. And I don't know if he, in writing this, is  
4 thinking about his -- the approach that we took on the  
5 materials from the pretrial phase when we did just  
6 produce it all or at least intended to produce it all.  
7 I don't know. I don't know what he is referring to  
8 there, but we certainly had many conversations about the  
9 approach that we took with the post-trial memos.

10 MR. MASLING: For the record, it's a May  
11 24, 2017 from Mr. Goodwin to Robin Ashin (ph), who is  
12 the OPR counsel. It has not been Bates stamped.

13 MR. SCIORTINO: May I follow up on AUSA #1

14 MR. MASLING: Yes.

15 MR. SCIORTINO: The thing about AUSA #1 is  
16 completely irreconcilable with your recollection. AUSA #  
17 says that AUSA #1 involvement in discovery was basically  
18 limited to this project where you are reviewing stuff  
19 that's already been produced in response to the judge's  
20 order that you designate things that are exculpatory.  
21 AUSA #1 said that AUSA #1 was -- after that order came down, AUSA #  
22 was basically assigned a range of documents that it was  
23 AUSA #1 job to go through.

24 But AUSA #1 was unequivocal that AUSA #1 was under the

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1 impression that every MOI in the case had been produced.  
2 [REDACTED] said that [REDACTED] own practice strongly disfavors letter  
3 disclosures, and that [REDACTED] almost never does that unless  
4 there is some witness safety issue, and you are worried  
5 that a witness is going to get killed. [REDACTED] said, in  
6 every case, every other case like this one where there  
7 is no witness safety issues, [REDACTED] just turns over the MOIs  
8 and never writes letters.

9 So [REDACTED] recollection is completely at odds with  
10 yours in that one, [REDACTED] says [REDACTED] was unaware of any  
11 undisclosed MOIs, period. And two, [REDACTED] says, had you  
12 looped [REDACTED] in about this disclosure letter, [REDACTED] would not  
13 have been on board with it because [REDACTED] just doesn't do it  
14 that way. So it's hard to square what you guys are  
15 saying one day after the other.

16 Is it possible that you are misremembering  
17 that [REDACTED] was involved in this disclosure letter?

18 A. I'm trying to figure out why [REDACTED] would say  
19 that. I -- you know, you hear somebody say that and you  
20 wonder if you are misremembering it, but my recollection  
21 is that -- I am very confident, as I sit here and think  
22 about it, that [REDACTED] looked at those letters. And I  
23 don't know if [REDACTED] --

24 BY MR. MASLING:

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1 Q. There is too many questions about the 6/22  
2 letter. It's just the one letter, the September 21,  
3 2016 because the June 22nd letter doesn't make -- I mean  
4 it makes some disclosures in the letters, but not about  
5 MOIs.

6 MR. SCIORTINO: Yes, that stuff's all been  
7 produced. It's just the unproduced stuff we are talking  
8 about now.

9 THE WITNESS: Right. So specifically as to  
10 the September letter, so I'll say generally in response  
11 to all of that, my belief certainly was that AUSA #1 was  
12 aware of how we were handling the memoranda. And is it  
13 possible that I assumed that based on conversations, you  
14 know, that AUSA #1 was present for and AUSA #1 didn't fully  
15 understand it. If AUSA #1 says AUSA #1 didn't know or AUSA #1 didn't  
16 believe at the time that we were handling the post-trial  
17 memoranda in the way that we did, I don't think AUSA #1 a  
18 liar.

19 It was my belief, and I believe AUSA #1 was present  
20 for conversations in which Booth and I discussed it. I  
21 don't know. I don't know what to say to that. Like I  
22 said, at the time -- it came up again in motion  
23 practice, either right before trial or during trial when  
24 there was another motion filed by the defense, another

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1 motion to compel. And at that stage -- you know, at  
2 that stage, we again discussed our approach to the  
3 memoranda.

4 Is it possible -- you know, is it possible  
5 that the conversations that I'm thinking about were all  
6 conversations between me and Booth and AUSA #1 was absent,  
7 I suppose so. I don't know what to make of it. My  
8 belief, certainly at the time, was that AUSA #1 understood  
9 how we were handling the post-trial MOIs and was on  
10 board with it, but if AUSA #1 says he wasn't.

11 BY MR. MASLING:

12 Q. The person who can break the tie won't talk to  
13 us?

14 MR. SCIORTINO: Well, the three things AUSA #1  
15 says are, one, AUSA #1 was completely unaware that any MOIs  
16 had not been disclosed; two, that AUSA #1 never seen that  
17 letter before, and had AUSA #1 seen that letter, would have  
18 advised against it because AUSA #1 doesn't like letters of  
19 disclosures; and 3, having seen the letter for the first  
20 time yesterday, AUSA #1 thought it was inadequate and  
21 insufficiently --

22 MR. MASLING: AUSA #1 saw the letter before  
23 yesterday.

24 MR. SCIORTINO: Oh, did AUSA #1 Yes, I'm

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1     sorry, [REDACTED] saw it in connection with the post-trial  
2     stuff. But having seen the letter for the first time  
3     post-trial, [REDACTED] thought it was inadequate and  
4     insufficiently detailed summary of the MOIs.

5             MR. MASLING: At least the [REDACTED] one.

6             MR. SCIORTINO: At least the [REDACTED] one.

7             THE WITNESS: I don't know that [REDACTED] would  
8     have known. [REDACTED] wasn't on the case and [REDACTED] as it  
9     turns out, and I didn't realize this until I started  
10    looking at this in connection with questions from you,  
11    [REDACTED] was a pre-indictment MOI that didn't get produced.  
12    And I can't remember right now if that one came in  
13    post-indictment. I don't remember what happened. It  
14    came in -- there was a delay in getting it.

15            You know, I don't know if -- here is what I  
16    can tell you. I do not have any record, I don't have  
17    any notes, I don't have an e-mail showing it to [REDACTED]  
18    Our offices were next door to each other. We looked at  
19    stuff, at documents and discussed case issues  
20    one-on-one. Certainly, in this period of time, we would  
21    have been together. During this period of time, meaning  
22    September, we would have been together just about all  
23    day every day.

24            I believe that I showed it to [REDACTED] You know,

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1 if [REDACTED] says [REDACTED] never seen it, I don't know what to make  
2 of that. There were -- obviously, there were a million  
3 things going on at that period in time, we were  
4 preparing various witnesses and so on. I don't know if  
5 [REDACTED] interpreted it as a -- I mean, if [REDACTED] genuinely  
6 thought that we were producing all the MOIs, and [REDACTED]  
7 interrupted that letter as identifying exculpatory  
8 material in something that had already been produced,  
9 like the -- as we did with the documents that were  
10 referred to in the June letter, then maybe that accounts  
11 for why [REDACTED] just looked at it and let it go.

12 I don't know. Until you told me that [REDACTED] said  
13 that -- I have not, since this whole thing started, I  
14 have been very careful not to discuss anything about the  
15 OPR inquiry at first, and then the investigation with  
16 anybody else who was involved in the events at the time.  
17 And it surprises me to hear that [REDACTED] says that.  
18 I don't know quite what to make of it. I guess I can  
19 speculate about what might reconcile it, but all I can  
20 say is at the time, I believed that [REDACTED] understood the  
21 approach that we were taking and was on board with it.  
22 Now, [REDACTED] was never -- certainly, [REDACTED] was not involved  
23 in -- I don't think [REDACTED] was present for the conversation  
24 that the U.S. Attorney and I had early on in discovery

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1 about how we were going to handling these, but I did --  
2 I was fairly confident -- I was quite confident until  
3 you told me that [REDACTED] says otherwise that [REDACTED] was well  
4 aware of it after [REDACTED] got involved in the BY case  
5 BY MR. MASLING:

6 Q. So for specific MOIs, let's start with the  
7 MOIs that were not disclosed that reflected interviews  
8 conducted pre-indictment. First, let me ask you, had it  
9 been your intent that all MOIs reflecting pre-indictment  
10 interviews be disclosed?

11 A. Yes.

12 Q. So let me show you which ones they are and  
13 let's ask about why they might not have been disclosed.  
14 So there is a tab that says OPR MOI, and there's a  
15 chart. You are going to be inherently suspect of the  
16 chart because it was prepared by Zuckerman. But as far  
17 as I can tell, it's pretty accurate, although there was  
18 a typo or two. So the pre-indictment MOIs are -- is --  
19 so [REDACTED] Witness #48, 11/21/2014, that's post-indictment,  
20 right because the indictment was earlier in November?

21 A. That's right. The indictment was the 11 or  
22 12th of November.

23 Q. So [REDACTED] Witness #14 another [REDACTED] Witness #14, [REDACTED] Witness #8  
24 [REDACTED] Witness #4 [REDACTED] Witness #6 [REDACTED] Witness #12 [REDACTED] Witness #15, [REDACTED]

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1 **Witness #1** **Witness #16** **Witness #17** So is there an explanation  
2 as to why those MOIs were not disclosed, despite your  
3 intention that they should have been?

4 A. What I believe happened was that we pushed out  
5 everything that we had done at -- everything that we had  
6 in the file at the time of the indictment. And when I  
7 say, "pushed out," we produced those MOIs in the initial  
8 rounds of discovery. I believe after -- and to be  
9 clear, my belief until you raised the issue with me  
10 whenever that happened, was that all of the MOIs or  
11 pre-indictment interviews had been disclosed. There  
12 were -- when I -- when you made me aware that that was  
13 not the case, and I looked at the circumstances of some  
14 of the memos that were not -- that were pre-indictment  
15 interviews were not produced, it looks like those came  
16 in late, in some cases very late.

17 Q. That's right.

18 A. And all I can say is that, I mean, to be  
19 bluntly honest, I didn't keep track of them. I just  
20 didn't -- I did not -- I lost visibility of the fact  
21 that there were, if I knew it at the time, that there  
22 were memos from '14 that hadn't been put in the file yet  
23 or completed yet at the time of the indictment. And,  
24 you know, those just didn't get produced. My belief at

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1 the time was that the indictments that were -- the MOIs  
2 that were coming in post-indictment were from  
3 post-indictment interviews.

4 Q. DOL SA #1 drafted all of the undisclosed  
5 pre-indictment interviews, except for one, which was  
6 authored by FBI SA #1 Does that mean anything? Do you  
7 think that that contributes at all to our understanding  
8 of why they came to the United States Attorney's office  
9 late? They seem to be drafted pretty close in time to  
10 when the interview took place, but didn't get sent over  
11 here until, as you know, some significant time after.

12 A. I mean, you know, I would say all things -- I  
13 would say that FBI SA #1 is a stronger agent in  
14 terms of FBI SA #1 organization and recordkeeping and getting  
15 things to us. It doesn't -- you know, I don't know if  
16 that contributes to the understanding of how it happened  
17 at all, but does it surprise me that the ones that came  
18 in late, in some cases really late, came in from DOL SA #1  
19 DOL SA #1 no.

20 Q. Okay.

21 A. And, you know, I hate to criticize either of  
22 those guys. It's un --

23 Q. I mean, they did get here. They got here in  
24 plenty of time to produce them. So it wasn't like they

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1 came in after trial.

2 A. That's right. I mean, I don't want to -- you  
3 know, it's unfortunate that in the course of something  
4 like this, you wind up saying things that seem critical  
5 of people. I respect both those guys a great deal.

6 Q. So getting back for a second to the September  
7 21, 2015 letter, you had said to us that your intent had  
8 been to disclose all pre-indictment MOIs. But you  
9 didn't do that for **Witness #8** right, you just decided to  
10 summarize it rather than just disclose the whole thing.

11 A. I know.

12 Q. So why did you do that?

13 A. All I can say about that is, at that point, it  
14 didn't register with me that **Witness #8** was pre-indictment.

15 Q. Okay.

16 A. That seems, again that -- I've given some  
17 thought to how that happened. It hadn't been produced.  
18 I don't remember paying attention to the date of  
19 interview on **Witness #8** And all I can -- the only  
20 explanation I can come up with for why it didn't  
21 register is number one, we were in the week before trial  
22 and all of that going on and number two, you do, over  
23 the course of an investigation a thousand interviews,  
24 and you are not necessarily going to have an accurate

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1 mental chart of when they all happened. It just  
2 didn't -- I did not -- I have no recollection of  
3 noticing at the time I included the language about the  
4 Witness #8 interview when the interview had taken place.

5 MR. SCIORTINO: Well, by the time the  
6 philosophy of discovery had changed too, right?

7 THE WITNESS: Correct.

8 MR. SCIORTINO: That's after you had the  
9 this discussion with Mr. Goodwin that you are only going  
10 to turn over the stuff that is required to turn over,  
11 after things had gotten personal with the defense, et  
12 cetera, all of the stuff that you discussed earlier  
13 today had happened in the intervening months.

14 So is that an explanation?

15 THE WITNESS: I don't know if we had made a  
16 different call if I had realized it was pre-indictment,  
17 but, at that point, my assumption, my belief at that  
18 point was that everything that was unproduced was  
19 post-indictment. So I was looking -- I looked at it.  
20 It would not have -- I don't remember specifically  
21 thinking this, but it would not have occurred to me that  
22 if it was unproduced, it was pre-indictment because I  
23 thought we -- I certainly would have thought anything  
24 that was from -- that one was from -- when was it from,

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1 **Witness #8** It was old.

2 Q. 2014, February 2014.

3 A. Yes.

4 I certainly believed in September of 2015, I  
5 certainly believed that anything from February of '14  
6 would have gone out in the initial rounds of discovery.  
7 I just didn't pay attention to the fact it was a  
8 February 14th interview.

9 Q. The distinction between post-indictment and  
10 pre-indictment, did that have any legal basis, do you  
11 know, or was it just a factual, how are we going to  
12 handle new material that comes in after our big initial  
13 production?

14 A. I don't know that there is a little basis for  
15 it. I mean, the assertion that I recall the U.S.  
16 Attorney making is that we don't have to produce --  
17 there is no requirement to produce MOIs. You have to  
18 produce information from the MOIs, if it falls within a  
19 category it has to be produced. I don't think that was  
20 specific to pre or post, but the other assertion that  
21 went along with that was that generally post-indictment  
22 interviews, trial prep interviews aren't going to be  
23 disclosed. And clearly there were interviews that we  
24 conducted post-trial that --